No. 95-191-CFX
Status: GRANTED

Title: O'Hare Truck Service, Incorporated, et al., Petitioners
v.
City of Northlake, et al.

Docketed:
July 31, 1995

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Grossman,Harvey

Counsel for respondent: Feiereisel,Gary M.

Ptn due & mld 7-3-195, see ml label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	May 23 1995	G	Application (A94-898) to extend the time to file a petition for a writ of certiorari from June 1, 1995 to July 31, 1995, submitted to Justice Stevens.
2	May 25 1995		Application (A94-898) granted by Justice Stevens extending the time to file until July 31, 1995.
3	Jul 31 1995	G	Petition for writ of certiorari filed.
5	Aug 18 1995		Order extending time to file response to petition until October 2, 1995.
6	Oct 2 1995		Brief of respondents City of Northlake, et al. in opposition filed.
7	Oct 18 1995		DISTRIBUTED. November 3, 1995 (Page 1)
8	Oct 27 1995	X	Reply brief of petitioners filed.
9	Dec 8 1995		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 19, 1996. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 16, 1996. Rule 29.2 does not apply. **********
10	Jan 19 1996		Joint appendix filed.
12	Jan 19 1996		Brief amicus curiae of Towing & Recovery Association of America, Inc. filed.
13	Jan 19 1996		Brief of petitioners O'Hare Truck Service Inc., et al. filed.
15	Jan 24 1996		SET FOR ARGUMENT WEDNESDAY, MARCH 20, 1996. (1ST CASE).
16	Feb 6 1996		CIRCULATED.
17	Feb 16 1996	X	Brief of respondents City of Northlake, Reid Paxson and Seymour Sapoznik filed.
18	Feb 16 1996	X	Brief amicus curiae of Illinois State Officials filed.
19	Feb 23 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Seventh Circuit.
20	Feb 28 1996		Record filed.
		*	Original record proceedings United States District Court for the Northern District of Illinois.
21	Mar 13 1996	X	Reply brief of petitioners filed.
24	Mar 20 1996		ARGUED.

Supreme Court, U.S.
FILED
JUL 31 1995

No. 95-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether the City violated the First Amendment by terminating business with an independent contractor solely because the contractor exercised his constitutionally protected right of political belief and association by supporting the incumbent mayor's political opponent for election?

RULE 29.1 LISTING

Petitioner O'Hare Truck Service, Inc. is a corporation that has no parent companies or subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

RULE 29.1 LISTING.....ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....2

JURISDICTION.....2

THE CONSTITUTIONAL PROVISIONS AT ISSUE.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....5

I. THIS CASE RAISES AN IMPORTANT QUESTION CONCERNING POLITICAL ASSOCIATION WHICH SHOULD BE DECIDED BY THIS COURT.....6

II. THE SEVENTH CIRCUIT'S DECISION CONTRIBUTES TO A DEEP CONFLICT AMONG THE FEDERAL COURTS OF APPEAL

REGARDING THE PROTECTION OF INDEPENDENT CONTRACTORS' RIGHTS OF POLITICAL ASSOCIATION.....12

III. THE ISSUES PRESENTED BY THIS CASE DIFFER IN IMPORTANT RESPECTS FROM THOSE PRESENTED IN *HEISER v. UMBEHR*; THE COURT SHOULD ADDRESS BOTH SETS OF ISSUES.....17

CONCLUSION.....18

APPENDIX

The order of the United States Court of Appeals for the Seventh Circuit denying rehearing (March 3, 1995).....1a

The decision of the United States Court of Appeals for the Seventh Circuit. (February 10, 1995).....2a

The decision of the United States District Court for the Northern District of Illinois (January 3, 1994).....10a

First Amended Complaint.....20a

TABLE OF AUTHORITIES

Cases

Abercrombie v. City of Catoosa, Oklahoma, 896 F.2d 1228 (10th Cir. 1990).....14

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).....8

Blackburn v. City of Marshall, Texas, 42 F.3d 925 (5th Cir. 1995).....14

Branti v. Finkel, 445 U.S. 507 (1980).....13

Buckley v. Valeo, 424 U.S. 1 (1976).....7, 10, 11

Connick v. Myers, 461 U.S. 138 (1983).....15

Downtown Auto Parks, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir.), *cert. denied*, __U.S. __, 112 S.Ct. 640 (1991).....4, 8, 11, 13

Elrod v. Burns, 427 U.S. 347 (1976).....6, 11, 13

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).....7

Horn v. Kean, 796 F.2d 668 (3d Cir. 1986).....13, 17

Hyland v. Wonder, 972 F.2d 1129 (9th Cir. 1992).....16

LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983), *cert denied*, 464 U.S. 1044 (1984).....11, 13

Lefkowitz v. Turley, 414 U.S. 70 (1973).....9

McDaniel v. Paty, 435 U.S. 618 (1978).....8

McIntyre v. Ohio Elections Comm'n, ___ U.S. ___, 115 S. Ct. 1511 (1995).....10

Meyer v. Grant, 486 U.S. 414 (1988).....10

Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974).....12

Mills v. Alabama, 384 U.S. 214 (1966).....7

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).....7

O'Hare Truck Service, Inc. v. City of Northlake, 843 F. Supp [illegible] (N.D. Ill. 1994).....2

O'Hare Truck Service, Inc. v. City of Northlake, 47 F.3d 883 (7th Cir. 1995).....passim

Pell v. Procunier, 417 U.S. 817 (1974).....8

Perry v. Sindermann, 408 U.S. 593 (1972).....9, 15

Pickering v. Board of Educ., 391 U.S. 563 (1968).....8, 15

Rutan v. Republican Party of Ill., 497 U.S. 62 (1990).....5, 6, 7, 9, 10, 15

Smith v. Cleburne County Hosp., 870 F.2d 1375 (8th Cir.), *cert. denied*, 493 U.S. 847 (1989).....14, 16

Speiser v. Randall, 357 U.S. 513 (1958).....11

Sweeney v. Bond, 669 F.2d 542 (8th Cir.) *cert. denied sub nom., Schenberg v. Bond*, 459 U.S. 878 (1982).....13

Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).....8

Umbehr v. McClure, 44 F.3d 876 (10th Cir.), *cert granted sub nom. Heiser v. Umbehr*, __ U.S. __ (June 29, 1995) (No. 94-1654).....6, 16, 17

White Plains Towing Corp. v. Patterson, 991 F.2d 1049 (2d Cir. 1993).....16

Wooley v. Maynard, 430 U.S. 705 (1977).....12

Constitutional Provisions

U.S. Const. amend. I.....2

U.S. Const. amend. XIV, §1.....3

Statutes

28 U.S.C. § 1254(1).....2

28 U.S.C. § 1291.....2

28 U.S.C. § 1331.....2

28 U.S.C. § 1343.....2

Other Authorities

Justice, G., *Suburbs Looking to Privatize Services*, Phila. Inquirer, March 17, 1995 at A1.....8

Rainey, J., *Study Urges L.A. to Privatize More Services*, L.A. Times, November 14, 1994 at B1.....7-8

Washburn, G., *RTA Chief Urges CTA to Privatize Some Bus Routes*, Chi. Trib., June 9, 1995, Metro West section, at 1.....7

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC.
and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON,
and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

Petitioners O'Hare Truck Service, Inc. and John A. Gratzianna respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on February 10, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which is sought by this petition, is reported as *O'Hare Truck Service, Inc. v. City of Northlake*, 47 F.3d 883 (7th Cir. 1995). It is reprinted in the appendix of this petition at pages 2a-9a (hereinafter "App. __"). The opinion of the United States District Court for the Northern District of Illinois is reported as *O'Hare Truck Service, Inc. v. City of Northlake*, 843 F. Supp. 1231 (N.D. Ill. 1994), and is reprinted in the appendix, App. 10a-19a.

JURISDICTION

Original jurisdiction in the United States District Court was based upon 28 U.S.C. §§ 1331 and 1343. Petitioners appealed this case to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291. On February 10, 1995, the Court of Appeals affirmed the District Court's decision. Rehearing by the Court of Appeals was denied on March 3, 1995. App. 1a.

On May 25, 1995, Justice Stevens ordered that the time for filing this petition for writ of certiorari be extended to and including July 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner O'Hare Truck Service, Inc. ("O'Hare") is a business located in Northlake, Illinois, that provides towing services at the request of municipalities throughout Cook and DuPage Counties in northern Illinois. O'Hare is owned and operated by Petitioner Gratzianna. App. 21a, para. 2.

Since 1965, O'Hare has participated in a system through which it provided the City of Northlake with towing services when the City needs a vehicle towed, as a result of an accident, mechanical breakdown, abandonment or other reason. App. 21a, para. 6; 22a, para. 9.

The City distributes its towing work among O'Hare and other tow companies by means of a towing rotation list with the names of the various tow companies to be contacted in turn when a need arises. App. 22a, para. 7. O'Hare has provided the City with towing services via the rotation list for almost thirty years.

App. 22a, para. 9. A substantial part of O'Hare's income came from fees paid by municipalities and others as a result of requests for towing services by Northlake and other municipalities. App. 21a-22a, para. 6.

It has been Northlake's policy and practice that companies on the rotation list will not be removed from the list without cause. Several mayors of Northlake, including Respondent Paxson and Paxson's predecessor, confirmed this policy and stated that O'Hare would remain on the rotation list so long as the quality of its services was maintained. App. 22a, para. 8, 10.

Nevertheless, following the mayoral election in the spring of 1993, O'Hare was removed from the rotation list by Police Chief Sapoznik, acting at the request of newly re-elected Mayor Paxson. App. 23a, para. 14. O'Hare's owner, Mr. Gratzianna, had refused to contribute to Mayor Paxson's re-election campaign, and had publicly supported Mayor Paxson's opponent, placing campaign posters for the opponent in O'Hare's place of business. App. 23a, para. 12, 13. On September 24, 1993, Petitioners filed this action, alleging that Respondents Mayor Paxson, Police Chief Sapoznik, and the City of Northlake, had violated their First and Fourteenth Amendment rights of political association and due process by ceasing to do business with O'Hare in retaliation for Mr. Gratzianna's refusal to contribute financially to Mayor Paxson's campaign and for his support for the Mayor's opponent during the last election.

Respondents moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). The District Court indicated in a preliminary order that it was disposed to grant dismissal based on the Seventh Circuit's holding in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991), which rejected any First Amendment protection (whether speech or association) for non-employees. *Id.* at 709 n. 5. Pursuant to the preliminary order, the Petitioners simultaneously submitted a First Amended Complaint and a memorandum of law opposing dismissal arguing that *Downtown Auto Parks* conflicted with pertinent Supreme Court precedent. The District Court subsequently dismissed the First Amended Complaint with prejudice.

On appeal, Petitioners asked the Seventh Circuit to reconsider its broad denial of First Amendment rights to independent contractors in light of the principles enunciated in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), and others of this Court's cases. The Seventh Circuit noted that it had already considered the impact of *Rutan* in *Downtown Auto Parks*, however, and refused to revisit the issue. Although the court had acknowledged in *Downtown Auto Parks* that "the scope of *Rutan*, and rationale behind it, seem to be at odds with the holding of" earlier Seventh Circuit decisions rejecting contractors' political association rights as the basis for a claim, the court nevertheless clung to the reasoning of those earlier cases. 938 F.2d at 709. The court concluded that "it should be up to the Supreme Court to extend *Elrod*." *O'Hare*, App. 5a. Relying on *Downtown Auto Parks* and earlier cases, the Seventh Circuit summarily rejected Petitioners' First Amendment claim and affirmed the dismissal.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Seventh Circuit has held that an independent contractor does not state a claim under the First Amendment, when he complains that the city terminated their business relationship because he declined to support or to contribute to the election campaign of the mayor of the city and instead supported the opposition candidate. Not only is the Seventh Circuit decision in conflict with this Court's

well settled precedent forbidding government to deny benefits because of one's political beliefs and associations, it also contributes to a deepening conflict among the Courts of Appeals over the degree of protection to be afforded to the core political expression and association of independent contractors and the standards under which such claims are to be considered. This case, along with *Heiser v. Umbehr*, No. 94-1654, provides the Court with a most timely opportunity to provide much needed guidance to the Courts of Appeals on several aspects of these important issues.

I. THIS CASE RAISES AN IMPORTANT QUESTION CONCERNING POLITICAL ASSOCIATION WHICH SHOULD BE DECIDED BY THIS COURT

1. Respondents eliminated O'Hare Trucking from the City's referral list to punish Mr. Gratzianna for supporting the political candidate of his choice and declining to support the incumbent mayor. This conduct calls into question the scope of the First Amendment's protection of political association and whether it is broad enough to encompass the political activities of independent contractors.

The circumstances of O'Hare Truck Service's removal from the City of Northlake's towing system confirm that this matter involves the most basic rights of "political belief and association [that] constitute the core of those activities protected by the First Amendment," *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 69 (1990) (citing *Elrod v. Burns*, 427 U.S. 347, 355-356 (1976) (plurality opinion)), including the rights of a person: to choose his political affiliations; to demonstrate his support for candidates of his choice; and, to decline to associate and to provide financial support to other candidates.

This Court consistently has reiterated that a major purpose of the First Amendment is to protect discussion of governmental affairs, including discussions of candidates for public office. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). In *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), the Court referred to campaigns for public office as the "fullest and most urgent application" of the First Amendment. It is equally settled that business entities, as well as individuals, enjoy the right to participate in the political process. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

The Court's decisions also have affirmed that the right of a citizen to make political contributions and expenditures is a fundamental First Amendment interest. In *Buckley v. Valeo*, 424 U.S. 1, 16-17, 22-23 (1976), the Court explained the interrelated character of political expression, association, and political spending. "Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22. Conversely, exaction of contributions from unwilling contributors was described by the Court as "tantamount to coerced belief." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 69 (1990) (approvingly citing *Buckley*, 424 U.S. at 19).

This Court should take this case to decide, hopefully in the affirmative, whether terminating valuable business benefits as a patronage practice violates the associational rights of independent contractors. Additionally, this case presents a particularly timely opportunity to rule on this issue because privatization of government services is so rapidly expanding today. *See, e.g.*, G. Washburn, *RTA Chief Urges CTA to Privatize Some Bus Routes*, Chi. Trib., June 9, 1995, Metro West section at 1 (cities nationwide are privatizing former municipal services; over 50 city services contracted out in Indianapolis); J.

Rainey, *Study Urges L.A. to Privatize More Services*, L.A. Times, November 14, 1994 at Metro B1 (Los Angeles' privatization efforts compared to programs elsewhere); G. Justice, *Suburbs Looking to Privatize Services*, Phila. Inquirer, March 17, 1995, Local section at A1 (cities' budget woes are driving trend toward privatization).

2. The Seventh Circuit's decision in this case excluded, as did the decisions of the Third and Eighth Circuit discussed below, an entire class of persons from the protection of the First Amendment "[b]ecause O'Hare is not an employee of the city." *O'Hare*, App. 5a. In holding that independent contractors will not be afforded even the restricted rights of political speech and association that are enjoyed by public employees, the court followed the reasoning of its own prior decisions which had established this disfavored category of independent contractors. *See LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983); *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 640 (1991).

However, the appeals court's reasoning distorts the impact of *Elrod*, *Branti*, and *Rutan* and erroneously suggests that those cases gave special status to employees not conferred on others. The Seventh Circuit has taken what was a limited exception to the general protection of the First Amendment and converted it to a limitation upon the right of persons generally. Nothing in the decisions of this Court warrants a blanket denial of the rights of political association based solely upon occupational status. Similar efforts by government bodies to impose complete bans on fundamental First Amendment rights because of a person's identity or occupation have been firmly rejected over the years. *See McDaniel v. Paty*, 435 U.S. 618 (1978) (clergy); *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977) (non-union workers); *Pell v. Procunier*, 417 U.S. 817 (1974) (prisoners); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (students); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (teachers).

Moreover, this Court has ruled in the Fifth Amendment context that government contractors are no less compelled to waive their right against self-incrimination upon threat of loss of contract than government employees faced with loss of a job. *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973). *See also Rutan*, 497 U.S. at 75 (deprivations less harsh than dismissals nevertheless force employees to conform their beliefs).

The Seventh Circuit has never addressed why, in light of these precedents, independent contractors should be treated as a class undeserving of constitutional protection. This Court should decide in this case whether those who serve government as independent contractors are excluded from the protective ambit of the First Amendment and *ipso facto* forfeit their associational rights.

3. In this case, as in others involving governmental interference with the fundamental rights of political speech and association, it is immaterial that O'Hare does not have a right to be or remain on the city's list of approved companies to whom it will refer business. *See Perry v. Sindermann*, 408 U.S. 593 (1972). Protection of these rights of political speech and association is not reserved for persons in government employment. However, even *Elrod* and *Branti* both involved at-will employees with no expectation of continuing employment. *Rutan*, 497 U.S. at 72. And the same was true in *Rutan* for the applicants for jobs and employees and former employees seeking promotions, transfers and recalls after lay-offs, *Id.* 497 U.S. at 72, 77 n. 9.

This case therefore raises the additional and important question of whether the interest in government work of an independent contractor constitutes a "valuable governmental benefit" protected under the *Perry* doctrine of unconstitutional conditions. 408 U.S. at 597.

4. The Seventh Circuit's sole focus upon O'Hare's status as independent contractor precluded the court from properly analyzing O'Hare's claim under the strict legal standards demanded by the First Amendment. Accordingly, it conducted no meaningful analysis of competing interests under any prescribed standard of scrutiny, or other test, enunciated or even obliquely suggested by the prior precedent of this Court. Because the City of Northlake retaliated against O'Hare for its owner's most basic and fundamental rights of political association, petitioner submits that the actions of the city and its mayor are subject to exacting scrutiny. *Buckley v. Valeo*, 424 U.S. at 44-45; *Meyer v. Grant*, 486 U.S. 414, 420 (1988); *McIntyre v. Ohio Elections Comm'n*, ___ U.S. ___, 115 S. Ct. 1511 (1995). While these cases involved government restrictions on the speech and association of private citizens, in *Rutan* the Court used the same exacting scrutiny to examine restrictions on the political associational rights of public employees, 497 U.S. at 74.

In this case, there is no hint of any public governmental interest supporting the removal; the only interest in the record is the mayor's individual financial and political self-interest. Had O'Hare acquiesced in the demand for a political contribution to remain on the rotation list, there would have been a *quid pro quo* arrangement of the type condemned in *Buckley*: "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. at 26-27. Nothing in the record supports any legitimate governmental interest in O'Hare's removal from the rotation list.

Nor do the considerations advanced by the Seventh Circuit in *O'Hare* and its earlier decisions to distinguish the political association rights of independent contractors from those of public employees constitute the type of compelling state interest

required by this Court's decisions. First, relying on its own decision in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), the Seventh Circuit considered the extent of the likely interference with an independent contractor's freedom to associate politically and found "little chance that a contractor's freedom would be impinged." *O'Hare*, App. 5a. This conclusion was explained in *LaFalce* and in *Downtown Auto Parks* as resting on the court's "surmise" that "independent contractors generally tend to be less dependent on government jobs than are public employees." *Downtown Auto Parks*, 938 F.2d at 709.

The Seventh Circuit's suggestion that the quantum of public business and a contractor's presumed lack of total dependency on that business justify infringements on political association is without support in this Court's decisions. Even if a contractor enjoys other public and private business, that fact does not supply a government interest in retaliating against political speech. One need not be totally dependent on government in order to assert First Amendment rights. For example, the tax exemption in *Speiser v. Randall*, 357 U.S. 513 (1958), may have been of negligible amount compared to the citizen's income or net worth. Denial of the benefit to punish political belief and association was the essence of the claim, as it is here.

The Seventh Circuit also failed to identify any state interest implicated by its second ground in *LaFalce*, the potential decision of some public contractors to act as "political hermaphrodites" by contributing to both political parties to insulate themselves from retaliation. Of course, any such decision by a private individual or entity to contribute or not contribute is protected by the First Amendment. *See Buckley*, 424 U.S. at 16. That some business owners may choose to contribute broadly provides no justification for coercing political contributions from those who would refrain from supporting some or all can-

didates. *Elrod*, 427 U.S. at 355; *Rutan*, 497 U.S. at 69; *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974); *Wooley v. Maynard*, 430 U.S. 705 (1977).

The appellate court apparently confused the interests of an incumbent with the interests of his municipality. The interests of party and officeholder and the legitimate interests of government often conflict; in this case the Seventh Circuit has upheld the interests of the official without appropriate consideration of the public interest.

This Court should grant this petition so that it may define the level of scrutiny which attaches to the rights in issue here. The Court should then ascertain whether there could be any compelling, vital, or overriding governmental interest to justify the restriction of core political association and whether such restrictions are narrowly tailored.

II. THE SEVENTH CIRCUIT'S DECISION CONTRIBUTES TO A DEEP CONFLICT AMONG THE FEDERAL COURTS OF APPEAL REGARDING THE PROTECTION OF INDEPENDENT CONTRACTORS' RIGHTS OF POLITICAL ASSOCIATION

A deep division currently exists among the federal courts of appeal concerning the ability of government to punish independent contractors on the basis of political association. Two radically different conceptions of First Amendment rights outside of the employment context underlie this disagreement. The decisions also display a general confusion as to the constitutional principles that are applicable. Unfortunately, the opportunities for conflict and confusion will only multiply, as more and more local units of governments privatize services that once were performed by government employees. For all of these

reasons, the Court should address this area of law and resolve the confusion in the circuits.

The Seventh Circuit's decision in the present case rests on a line of cases dating back to *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), in which the court refused to afford contractors the First Amendment freedom of political association which government employees possess under *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). The court distinguished the situations of independent contractors and public employees, hypothesizing that contractors were better equipped economically than employees to deal with any coercive pressure from politically-based decision-making. Although the court found in *Downtown Auto Parks*, 938 F.2d 705, that much of the support for this position had been eroded by *Rutan*, the court reasoned that the Supreme Court had not yet directly addressed the rights of independent contractors *per se*. *Id.* at 709-710. Accordingly, the Seventh Circuit was free to continue to hold that the government may retaliate against a contractor for that contractor's speech or political associations. The Seventh Circuit makes no distinction between free speech and association cases, affording no protection to independent contractors in either situation. *Id.* at 709 n.5.

Other federal courts of appeal, including the Third and the Eighth Circuits, have taken the same position as the Seventh Circuit. In *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc), the Third Circuit agreed with the rationale of *LaFalce* and refused to apply *Elrod* and *Branti* to recognize a cause of action for a contractor claiming retaliation because of his party affiliation. That court has not revisited the issue of independent contractors' First Amendment rights since that decision. The Eighth Circuit case, *Sweeney v. Bond*, 669 F.2d 542 (8th Cir.), *cert. denied sub nom. Schenberg v. Bond*, 459 U.S. 878 (1982), predated *LaFalce* and, like *Horn*, rejected a claim of

retaliation against an independent contractor based on party affiliation. While *Sweeney* is still the law of the Circuit for association or patronage cases involving independent contractors, that court recently retreated somewhat from that position by allowing an independent contractor to bring a claim of retaliation for the exercise of his right to free speech. *See Smith v. Cleburne County Hosp.*, 870 F.2d 1375 (8th Cir.), *cert. denied*, 493 U.S. 847 (1989) (the free speech claims of an independent contractor who was analogous to an employee could be considered).

In direct opposition to the Seventh Circuit's approach, the Tenth Circuit in *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990), recognized political association by an independent contractor (a towing company's lack of support for a mayor during a re-election campaign) as activity protected by the First Amendment. The court relied on *Perry* and *Elrod* for the more general principle that the government may not deny a person a benefit on any basis that infringes his constitutionally protected interests. *Id.* at 1233. Also in contrast to the Seventh Circuit's position, the Fifth Circuit earlier this year ruled that the government may not penalize an independent contractor for exercising his First Amendment freedom of speech simply because it does not like the content of that speech. *See Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995).

While *Blackburn* is limited to free speech and not political association, it implicitly rejects the blanket ban on contractors' expressive rights formulated by the Seventh Circuit. As the Court explained in *Blackburn*:

> At the outset, we reject the district court's apparent assumption that only public employees enjoy the protections of the First Amendment. The district court's reasoning is inverted. Every citizen enjoys the First Amendment's protections against governmental interference with free speech, but the First Amendment rights of public employees are restricted by the nature of the employer-employee relationship.

Id. at 931.

The *Blackburn* court went on to identify a two-tier analysis. If the claimant is either a public employee or closely akin to one, the test announced in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), applies. For non-employees or ordinary citizens, "a court generally examines a free speech claim under the more First Amendment friendly standard enunciated in *Perry* [*v. Sindermann*, 408 U.S. 593 (1972)]." 42 F3d at 932. Because the tow truck operator bringing the claim in *Blackburn* was not similar to an employee, the court applied the *Perry* test.

Recently, and in conformity with its earlier decision in *Abercrombie*, *supra*, the Tenth Circuit in *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995) *cert. granted sub nom. Heiser v. Umbehr*, __ U.S. __ (certiorari granted June 29, 1995) (No. 94-1654), agreed with this analysis. Although *Heiser* involved a free speech claim only, the court noted in *dictum* that associational ties also enjoy protection from governmental interference, citing *Rutan*, 497 U.S. at 76:

> The Court stated the overriding principle as follows: The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.

Umbehr, 44 F.3d at 882. (*See also Perry*, 408 U.S. at 597 ("For if the government could deny a benefit to a person because of his constitutionally protected speech *or associations*, his exer-

cise of those freedoms would in effect be penalized and inhibited") (emphasis added)). The Tenth Circuit recognized that this holding placed it squarely in conflict with the position adopted by other circuits, including the Seventh Circuit in *LaFalce* (and *O'Hare*), and specifically requested Supreme Court guidance to clarify this area. *Id.* at 883.

The Ninth Circuit has not decided a case on the First Amendment rights of independent contractors *per se*, but its decision in *Hyland v. Wonder*, 972 F.2d 1129, 1135 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2337 (1993), indicates its agreement with the position taken by the Fifth and Tenth Circuits. Other federal courts of appeals have given independent contractors the same First Amendment rights as public employees, judging their free speech claims under the *Pickering/Connick* standard. In *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (2d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 185 (1993), the Second Circuit applied the *Pickering/Connick* test on the assumption that a towing operator who did not have a formal contract with the state nevertheless had an interest "tantamount to employment." *Id.* at 1059. Similarly, in *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989), the Eighth Circuit found that a doctor-hospital relationship was sufficiently similar to an employment relationship that *Pickering* governed the doctor's free speech claim.

Unfortunately, the courts adopting these two approaches rarely identify or enunciate the underlying theories, and, as a result, confusion reigns in an ever-widening area of law. Political association cases such as the present one, which involve a contractor's refusal to provide support, financial or otherwise, to an incumbent public official in an election, are a particular source of confusion because they involve both freedom of speech and freedom of association concerns. Courts often gloss over the dual nature of these cases.

The need for this Court to clarify the standards applicable in this area will only become more pressing in the future. State and local governments nationwide are in the midst of privatizing an increasing amount of their business in an effort to control the costs of government.

As Judge Gibbons noted in dissent,

> . . . the majority's holding will encourage the contracting out of governmental functions. Public employees no longer needed because their work has been contracted out can then be freely discharged as surplus, while the officials in government will remain free to pressure contractors and their employees to support incumbent politicians. The employees of such contractors, forced against their will to contribute time, money, and loyalty to a party not of their choice, will be remediless when faced with the state-law, at-will employment doctrines.

Horn v. Kean, 796 F.2d at 684.

The attention of the Court is urgently needed to prevent wildly varying decisions that are likely to result from courts faced with the growing trend of privatization.

III. THE ISSUES PRESENTED BY THIS CASE DIFFER IN IMPORTANT RESPECTS FROM THOSE PRESENTED IN *HEISER v. UMBEHR*; THE COURT SHOULD ADDRESS BOTH SETS OF ISSUES

On June 29, 1995, this Court granted certiorari in *Heiser v. Umbehr* (decision below, *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995)). While that case, like this one, involves the issue of

whether First Amendment rights extend to those who provide services to the government, it involves only a free speech claim. As a result, a decision by this Court in *Heiser* likely will be restricted to the issue of a contractor's free speech claims unrelated to political association issues. Thus, *Heiser* is as far from resolving the issues presented by *O'Hare* and its kin as *Pickering* was from resolving the issues presented by *Elrod* and its progeny.

Even after this Court reaches a decision in *Heiser*, courts are likely to continue to have difficulty distinguishing political association claims from other speech claims by contractors, and will apply various tests on an *ad hoc* basis. Courts will continue to be divided (as they are now) over several points: whether the tests applicable to an employee's free speech claims should also be applied to an independent contractor's political association claims; whether political association cases should be governed by the *Elrod/Branti/Rutan* analysis, or whether courts should attempt to define for themselves some blended type of analysis in political association cases. None of these questions is likely to be resolved by the Court's ultimate decision in *Heiser*. Because the need for guidance is as pressing in the area of contractors' political association rights as in the speech area, Petitioners urge this Court to resolve both issues by accepting this case for review as well.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold this petition for remand pending the resolution of *Heiser*.

Respectfully submitted,

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Chicago, Illinois
July 31, 1995

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

O'HARE TRUCK SERVICE, INCORPORATED AND JOHN A. GRATZIANNA,
Plaintiffs-Appellants,

v.

CITY OF NORTHLAKE, REID PAXSON, MAYOR, AND SEYMOUR SAPOZNIK, POLICE CHIEF,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 94-1222, No. 93 C 5860
-- **Milton I. Shadur,** *Judge.*

Before HON. DONALD P. LAY*, *Circuit Judge*, HON. FRANK H. EASTERBROOK, *Circuit Judge*, HON. MICHAEL S. KANNE, *Circuit Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-captioned case, all of the judges on the original panel have voted to deny the petition for rehearing.

IT IS ORDERED that the petition for rehearing is hereby DENIED.

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* The Honorable Donald P. Lay, of the Eighth Circuit, sitting by designation.

In the
United States Court of Appeals
Seventh Circuit

No. 94-1222
O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,
Plaintiffs-Appellants,

v.

CITY OF NORTHLAKE, REID PAXSON, MAYOR, and SEYMOUR SAPOZNIK, POLICE CHIEF,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 5860--**Milton I. Shadur**, *Judge*.

ARGUED SEPTEMBER 12, 1994 - DECIDED FEBRUARY 10, 1995

Before LAY*, EASTERBROOK, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. O'Hare Truck Service, Inc. and its owner John Gratzianna (collectively "O'Hare") filed this suit under 42 U.S.C. § 1983 against the City of Northlake, Illinois, its present mayor Reid Paxson and police chief Seymour Sapoznik (collectively "Northlake"). O'Hare claims that

* The Honorable Donald P. Lay, of the Eighth Circuit, sitting by designation.

Northlake violated both its First Amendment and procedural due process rights. As the case was dismissed on the pleadings, we rely on the facts alleged in O'Hare's complaint.

Northlake, a suburb of Chicago, is a city of approximately 12,000 people. From time to time, Northlake's police department needs a vehicle towed. Northlake does not tow vehicles itself, and it does not contract directly with a tow company for services. Fees for towing services are paid by the towed vehicle's owner.

Since at least 1965, the police department has maintained a "rotation list." On the rotation list are a number of tow companies from the area (we do not know how many). When a vehicle tow is necessary, the police dispatcher is notified and calls a company on the list. If that company does not answer or cannot respond to the request, the dispatcher calls the next towing company listed until a company responds and makes the tow. When towing services are again required, the police dispatcher begins with the next company on the list — and so on — in rotation.

O'Hare alleges that the previous Northlake mayor, Gene Doyle, had told Gratzianna that his company would remain on the rotation list as long as it maintained the quality of its services. Furthermore, O'Hare claims that, shortly after Paxson was elected mayor in 1989, Paxson told Gratzianna "that he was pleased with the services provided by [O'Hare] and would continue the policy of former Mayor Doyle to retain O'Hare, and others, on the rotation list so long as the quality of services were maintained." Before the 1993 election for mayor of Northlake, Paxson's re-election committee solicited a campaign contribution from Gratzianna. Gratzianna refused and publicly supported Paxson's opponent. Paxson won reelection, and shortly thereafter O'Hare was removed from the rotation list.

As we are reviewing the district court's dismissal of the ac-

tion under 12(b)(6), we accept as true well pled facts and make all reasonable inferences in favor of O'Hare. *Propst v. Bitzer*, 39 F.3d 148, 154 (7th Cir. 1994).

I. First Amendment

O'Hare claims that, by removing it from the rotation list in response to its support of Paxson's mayoral opponent, Northlake infringed its First Amendment right to freedom of political association. In *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980), the Supreme Court held that most government employees may not be discharged solely on the basis of their political affiliation. The Court extended its holding in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990), to cover hiring, promotion, transfers and recalls as well.

Most courts that have explicitly addressed the issue whether to extend *Elrod*'s protection beyond government employees, however, have refused to do so. *See, e.g., Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044, 104 S. Ct. 712, 79 L. Ed. 2d 175 (1984); *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir.), *cert. denied*, 459 U.S. 878, 103 S. Ct. 174, 74 L. Ed. 2d 143 (1982). Recently, however, in *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995), the Fifth Circuit, in a case similar to the one now before us, implicitly took a contrary position. *See also Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990). On the other hand, in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991), this circuit held (consistent with *Horn*, *LaFalce*, and *Sweeney*) that a city may refuse to renew a parking lot lease with an independent contractor based upon that contractor's political affiliation. The

plaintiff in *Downtown Auto Parks* asked that we reexamine, in light of *Rutan*, our holding in *LaFalce*, the first case in this circuit that declined to afford independent contractors *Elrod*'s protection.

In *LaFalce*, we gave three reasons for declining to extend *Elrod* to independent contractors. First, we examined the extent of the likely interference with an independent contractor's freedom to associate politically. We found that, compared to the impact on governmental employees, there was little chance that a contractor's freedom would be impinged. Second, we noted that the practical, administrative consequences of extending *Elrod*'s protection could be severe. "A practical consideration reinforcing our caution is that a decision upholding a First Amendment right to have one's bid considered without regard to political considerations would invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser." *Id.* at 294. Third, in light of these considerations, the court concluded that it should be up to the Supreme Court to extend *Elrod*. *Id.* at 295. The court in *Downtown Auto Parks* declined to overrule *LaFalce*, noting that although "*Rutan* did extend First Amendment protection, [it did so] only within the context of government employment." *Downtown Auto Parks*, 938 F.2d at 710. We likewise refuse to revisit the issue. Because O'Hare is not an employee of the city, we hold that the district court did not err in dismissing O'Hare's First Amendment challenge.

II. Due Process

O'Hare also claims that Northlake violated its procedural due process rights by removing it from the rotation list without holding a hearing or giving it reasons for the removal. The district court dismissed O'Hare's procedural due process claim;

it concluded that O'Hare did not have a property interest in remaining on the rotation list. The district court based its holding on our statement in *Wolf v. City of Fitchburg*, 870 F.2d 1327 (7th Cir. 1989), that "the 'mutually explicit understandings' that constitute property interests under the holding of *Perry* cannot be based on the representations of government officials who are not authorized to make such representations." *Id.* at 1334.

The mutually explicit understandings referred to by the district court stems from two Supreme Court decisions in the early 70s. In *Board of Regents of State Colleges v. Roth*, the Supreme Court explained that

> [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. . . . Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .

408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972).

In *Roth's* companion case, *Perry v. Sinderman*, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570 (1972), the Court stated, "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." The Court invoked the state law concept of implied contracts (a type of mutually explicit understanding) to hold that the respondent, a teacher in the state college system in Texas, might have had a right to a pretermination hearing due to "an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." *Id.*, 408 U.S. at 602, 92 S. Ct. at

2700.

O'Hare seeks to bring its situation under this mutually explicit under- standings jurisprudence. The most common form of mutually explicit understanding is an implied contract, and the district court's analysis centers on this area. The district court's conclusion that the mayor lacks authority to bind the city to an implied contract might well be correct. Yet we believe that the district court's focus on whether O'Hare could prove a contract interest was too narrow.[1] As it did in this court, O'Hare simply, but rather vaguely, argued to the district court that because other courts had found a property interest in remaining on a towing list it should also.[2]

A number of courts have found a towing company to possess a property interest in remaining on a rotation list. In those cases, state statutes, or city ordinances or police department rules passed pursuant to statute, created the property interest. *See Pritchett v. Alford*, 973 F.2d 307, 317 (4th Cir. 1992) (plaintiff had property interest due to South Carolina regulations); *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1230 (10th Cir. 1990) (plaintiff had property interest due to Oklahoma wrecker statute); *Gregg v. Lawson*, 732 F. Supp. 849, 853

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[1] Moreover, a contract analysis is inapposite. The only contract that conceivably arises is between O'Hare and the owner of the towed vehicle. Northlake pays O'Hare nothing, and O'Hare performs no direct service for the city.

[2] A party is deemed to have forfeited any legal argument not raised before the district court. *E.g., Citizens Ins. Co. of America v. Barton*, 39 F.3d 826, 828 (7th Cir. 1994). While O'Hare's legal argument before this court and the district court for finding a property interest was not a model of clarity, we do not believe that it was not made. The plaintiffs in the cases relied on by O'Hare argued that a statute or regulation gave them a property interest. We interpret O'Hare's argument to be the same.

(E.D.Tenn.1989) (plaintiff had property interest due to regulations); *but see White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1062 (2nd Cir. 1993) (holding that plaintiff did not have property interest in towing assignment because arrangement was informal, in that no statute or regulation governed the assignment and plaintiff had no contract interest in assignment).

O'Hare admits that no statute, ordinance or written rule governs the rotation list. But, O'Hare appears to argue that Northlake's policy and practice concerning the rotation list rises to the level of an informal or unwritten administrative rule, bestowing upon it a property interest in remaining on the rotation list.

We have, of course, found property interests arising from internal rules or regulations, but only when they have the force of law. *See, e.g., Hohmeier v. Leyden Community High Sch. Dist. 212*, 954 F.2d 461 (7th Cir. 1992); *Miller v. Henman*, 804 F.2d 421, 424 (7th Cir. 1986); *see also Schweiker v. Hansen*, 450 U.S. 785, 789, 101 S. Ct. 1468, 1471, 67 L. Ed. 2d 685 (1981) (holding that Claims Manual of the Social Security Administration "is not a regulation. It has no legal force and does not bind the SSA.").[3] Because property interests are defined by reference to state law, *see Roth*, 408 U.S. at 577, 92 S. Ct. at 2709, we must look to whether Illinois law recognizes such a claim. Outside the employment context (which is inapplicable because O'Hare is clearly not an employee), we have

[3] We note that, even if a rule or regulation has been promulgated in accordance with formal procedures, a person may not have a property interest in having the procedures followed. *See Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) (holding that in order to provide property interest, a regulation must establish "substantive predicates" that govern official discretion); *see also DeTomaso v. McGinnis*, 970 F.2d 211, 213 (7th Cir. 1992).

found no Illinois case that recognizes a legal entitlement based on implied or informal rules or regulations.

Moreover, with one exception,[4] O'Hare does not point us to, nor have we independently discovered, any decisions in other states which recognize such an entitlement. In this case, unwritten and informal policies and procedures relating to an internal police operation for securing the towing of vehicles in Northlake cannot be used as a basis for O'Hare to secure a property interest in being maintained on the rotation list.

For the reasons stated above, we AFFIRM the district court's dismissal of O'Hare's complaint.

[4] In *Morris v. McCallie*, Civ. 4-91-032, 1993 WL 625544, slip op. (E.D. Tenn. 1993), the district court held that a wrecker service held a property interest in remaining on a rotation list. In *Morris*, the Sheriff of Franklin County maintained an informal rotation list similar to the one in this case. It is unclear, however, whether the plaintiff held the interest due to an implied contract or due to the informal rules set out by the Sheriff. Moreover, the court seemed especially swayed by "[t]he fact that the Sheriff indicated that written regulations would eventually be adopted . . . ." *Id.* at 4.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 93 C 5860

O'HARE TRUCK SERVICE, INC., *et al.*,
Plaintiffs,

v.

CITY OF NORTHLAKE, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

SHADUR, Senior District Judge:

This Court's December 8, 1993 memorandum opinion and order (the "Opinion," a copy of which is attached) addressed the motions that had been filed by City of Northlake ("Northlake") and its Mayor Reid Paxson ("Paxson") and its Police Chief Seymour Sapoznik ("Sapoznik") to attack the Complaint brought against the three of them by O'Hare Truck Service, Inc. ("O'Hare") and its owner John Gratzianna ("Gratzianna"). For the reasons stated in the Opinion — focused in principal part on our Court of Appeals' decision in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991) — O'Hare and Gratzianna were ordered to file either (Opinion at 1235):

1. a memorandum identifying any relevant authority (presumably post-*Downtown Auto Parks*) that preserves either or both of the claims set out in the Complaint or

2. an Amended Complaint stating a differently framed claim or claims — claims capable of being advanced under Section 1983 in the objective and subjective good faith demanded by Rule 11 — that is or are viable in light of *Downtown Auto Parks*.

In response O'Hare and Gratzianna have tendered both a proposed First Amended Complaint ("FAC") and a supporting Memorandum of Law, and they are granted leave to file both of those documents.

As the O'Hare-Gratzianna motion for leave to file those papers says, the FAC "does not change the substance of plaintiffs' claims, but rather adds additional detail." That statement must be read as their acknowledgement that if the FAC's amplification does not do the job either, the "existing flaws are both incurable and inevitably fatal" (Opinion at 1235 n. 1).

This Court has therefore reviewed both the FAC and all of the cases that are sought to be relied on in the Memorandum of Law, and it concludes that the problems initially identified in the Opinion have not been and cannot be overcome by O'Hare and Gratzianna. Accordingly both the FAC and this action are dismissed for the reasons stated both in the Opinion (which of course need not be repeated here) and in this opinion.

Due Process Claim

Because O'Hare-Gratzianna Mem. 2-5 first speaks to their due process claim as set forth in FAC Count II, this opinion will do the same. O'Hare and Gratzianna seek to blunt (or to shunt aside entirely) the fatal impact of *Downtown Auto Parks* by citing to a number of cases from other jurisdictions, all of

them dealing with the cancellation or nonrenewal of towing services— cases that (wholly unlike *Downtown Auto Parks*, 938 F.2d at 710-11) do find a "property" interest in the sense that is demanded by the Fourteenth Amendment and by the seminal decisions applying it in this area of law (*Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570 (1972)).

But all except one of those other decisions dealt with formalized official sources of property rights — created by the relevant state law, as *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709 teaches must be the case — of types that are wholly absent here:[1]

1. In *Gregg v. Lawson*, 732 F. Supp. 849, 854 (E.D.Tenn.1989), "printed rules and regulations govern the parties' conduct and formal application procedures exist for anyone wanting to be placed on the list."

2. *Jennings v. Waldrop*, No. 3:86-cv-102-GET, slip op. (N.D.Ga.1988) dealt with a "written policy of the State Patrol" that set express limitations on a wrecker's removal from the list.

3. *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1232 (10th Cir. 1990) was based upon rights expressly created by statute.

4. *Pritchett v. Alford*, 973 F.2d 307, 317-18 (4th Cir. 1992) was similarly grounded on rights that had been formally and

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[1] For some reason O'Hare-Gratzianna Mem. 3-4 does not examine the cited Courts of Appeals' cases before turning to the cited District Courts' opinions. As illogical as that may be, this opinion will follow the same sequence as their Memorandum.

expressly created—in that instance by formally adopted regulations. Only the unpublished opinion in *Morris v. McCallie*, Civ. 4-91-032, slip op. (E.D. Tenn. 1993) dealt with a situation that resembled the informal practice described in the current case, nonetheless finding that the wrecker had a "property" interest under those circumstances.

But we are regularly reminded by our own Court of Appeals that opinions by district judges do not create precedents in their own bailiwicks, let alone on foreign soil.[2] And for its part our Court of Appeals has regularly continued to make it plain that "the 'mutually explicit understandings' that constitute property interests under the holding of *Perry* cannot be based on the representations of government officials who are not authorized to make such representations" (*Wolf v. City of Fitchburg*, 870 F.2d 1327, 1334 (7th Cir. 1989), quoted and reconfirmed in *Santella v. City of Chicago*, 936 F.2d 328, 331 (7th Cir. 1991)). Nothing that is alleged in the FAC about the practice followed by Northlake's prior Mayor satisfies the need for a binding and enforceable right — to the contrary, the FAC says nothing at all about any ordinance adopted, or any other action taken, by Northlake's governing body that is authorized to make such commitments (*Santella*, 936 F.2d at 331-32).

Accordingly what was said in the Opinion remains true. *Downtown Auto Parks*, coupled with the other uniform case law from our Court of Appeals that fleshes out the concept of

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[2] O'Hare-Gratzianna Mem. 4-5 also inexplicably seeks to rely on the opinion of this Court's colleague Honorable Charles Kocoras in *Medcare HMO v. Bradley*, 788 F. Supp. 1460 (N.D. Ill. 1992). As this opinion later reflects, *Medcare HMO* in fact supports this Court's determination rejecting the FAC's other (free-speech-based) claim. And as for the FAC's due process claim, *Medcare HMO* treated with a statutorily conferred right—the paradigmatic example of a state-created property interest.

"property" for due process purposes, mandates the dismissal of the O'Hare-Gratzianna due process claim.[3]

First Amendment Claim

As to the free-speech-based claim advanced in FAC Count I, O'Hare-Gratzianna Mem. 6 urges that *Downtown Auto Parks* cannot be reconciled with *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990). But in the judicial hierarchy, district judges are bound by the teaching of their Courts of Appeals. And here is what *Downtown Auto Parks*, 938 F.2d at 710 (citations to decisions by other Courts of Appeals omitted) says about the effect of *Rutan*:

> *Rutan* did extend First Amendment protection, but only within the context of government employment. *Rutan* was the culmination of a line of cases "concerned only with the constitutionality of dismissing public employees for partisan reasons." *Elrod* [*v. Burns*], 427 U.S. [347] at 353, 96 S. Ct. [2673] at 2680 [49 L. Ed. 2d 547] [(1976)]. All circuits considering the question of whether to extend the holdings of *Elrod* and *Branti* [*v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574] [(1980)] to independent contractors have declined. Since *Rutan* was decided, the Sixth Circuit has also refused to prohibit the government from considering political criteria in awarding of

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[3] As suggested in Opinion at 1235, Paxson and Sapoznik are also entitled to be dismissed on qualified immunity grounds, even apart from the holdings just announced and to be announced in the text. Neither of the rights sought to be asserted here by O'Hare and Gratzianna was "clearly established" within the teaching of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) and their progeny at the time that Northlake's towing needs ceased to be referred to O'Hare.

> public contracts. We continue to concur in the view taken by the other circuits, and hold that political favoritism in the awarding of public contracts is not actionable.

Judge Kocoras has already rejected a litigant's invitation to disavow *Downtown Auto Parks* on the authority of *Rutan* (*Medcare HMO*, 788 F. Supp. at 1465-66), and this Court of course does the same.[4] Thus nothing asserted in the current filings by O'Hare and Gratzianna has altered the Opinion's indications in this respect either. Dismissal of the O'Hare-

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[4] O'Hare-Gratzianna Mem. 6-7 points to *Lipinski v. Dietrich*, 578 F.Supp. 235 (N.D. Ind. 1984), and to the manner in which it was distinguished in *Downtown Auto Parks*, 938 F.2d at 710, as support for their own First Amendment claim. Although the District Court opinion in *Lipinski* would certainly provide such support, the Court of Appeals in *Downtown Auto Parks* did not itself hold that *Lipinski* was decided correctly—on the contrary, it simply assumed that arguendo in the course of deciding that the case would not help the plaintiff there anyway. This Court has examined the issue independently, and it holds that where an independent contractor has no entitlement to an ongoing relationship with a governmental unit (that is, no "property" interest, as already found here), but only a hoped-for continuation of that relationship (which is thus the legal equivalent of the governmental unit's granting a series of awards of business to that independent contractor), no principled distinction may be drawn between the government's discontinuance of that relationship and the government's refusal to deal with an independent contractor in the first instance: In each instance a claim that the nondealing was free-speech- based must be viewed through the same lens. Hence what was said in *Downtown Auto Parks*, 938 F.2d at 710 applies here with equal force:

> In sum, plaintiff's First Amendment claim must be dismissed because the City was not prohibited from allowing politics to influence its decision not to award a contract to plaintiff.

Gratzianna "freedom of speech" claim is required as well.

Conclusion

Although Paxson and Sapoznik have legitimate dual grounds for dismissal from this action (see n. 3), their second ground is not essential to the end result: This lawsuit is dead on the bases discussed in the text of this opinion — bases that those individual defendants share with Northlake itself. Both the FAC and this action are dismissed with prejudice.

ATTACHMENT

MEMORANDUM OPINION AND ORDER

City of Northlake ("Northlake") and its Mayor Reid Paxson ("Paxson") and its Police Chief Seymour Sapoznik ("Sapoznik") have filed motions attacking the Complaint brought against the three of them by O'Hare Truck Service, Inc. ("O'Hare") and its owner John Gratzianna ("Gratzianna"). All three defendants seek dismissal of this action (not merely of the Complaint) under Fed.R.Civ.P. ("Rule") 12(b)(6),[1] while Paxson and Sapoznik also move separately for summary judgment under Rule 56.

Even though O'Hare and Gratzianna have not yet had the opportunity to respond to the newly-filed motions, the principle that could call for dismissal of their existing Complaint is so plain — deriving as it does from a recent opinion of our Court of Appeals on all fours — that this opinion is being issued sua sponte to focus the required response by counsel for O'Hare and Gratzianna. Here in brief is what the Complaint asserts:

[1] What the Rule 12(b)(6) motion actually asks for is the "dismissal with prejudice of plaintiffs' Complaint." Because a with-prejudice dismissal forecloses any possible cure of a defective complaint and carries with it a claim-preclusive effect, a court should not consider entering such an order unless the complaint's existing flaws are both incurable and inevitably fatal. As the text of this opinion will reflect, this Court is instead giving O'Hare and Gratzianna the opportunity to go back to the drawing boards if needed.

1. O'Hare has been one of a number of companies that provide towing services when called upon to do so by Northlake. Indeed, for nearly three decades O'Hare has been on the "rotation list" of those asked to provide such services from time to time.

2. Earlier this year Gratzianna refused to contribute to Paxson's re-election campaign as Northlake's Mayor (he supported Paxson's opponent instead). For that reason Sapoznik assertedly cut O'Hare from the rotation list at Paxson's direction.

To provide this District Court with subject matter jurisdiction over that set of allegations, O'Hare and Gratzianna must set forth a federal question claim or claims. They seek to do so by invoking 42 U.S.C. § 1983 ("Section 1983"), claiming the violation of their constitutional rights to freedom of speech and to due process of law.

But *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991) sounds the death knell of both of those claims. *Downtown Auto Parks* teaches that a non-employee of a unit of state government, in the absence of a contractual relationship with that governmental body, lacks any interest in property such as to render actionable under Section 1983 any infringement of the non-employee's expectation of doing business with the governmental body. In so holding as to a freedom-of-speech claim, our Court of Appeals refused to extend

beyond an actual employer-employee relationship the First Amendment protection pronounced in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990). And *Downtown Auto Parks* rejects any non-employee's cause of action of the type advanced here under Section 1983 — either in terms of a claimed violation of free speech (938 F.2d at 708-10) or in terms of any claimed entitlement to due process of law (*id.* at 710-11).

That set of principles clearly dooms O'Hare's and Gratzianna's present federal claims against Paxson and Sapoznik as well as against Northlake itself. And that is so even without reference to the further fatal defect that exists in relation to Paxson and Sapoznik (a defect that really follows a fortiori): the fact that neither of the rights sought to be asserted here by O'Hare and Gratzianna was "clearly established" so as to overcome Paxson's and Sapoznik's qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) and their progeny.

O'Hare and Gratzianna are therefore ordered to file in this Court's Chambers on or before December 28, 1993, either:

1. a memorandum identifying any relevant authority (presumably post-*Downtown Auto Parks*) that preserves either or both of the claims set out in the Complaint or

2. an Amended Complaint stating a differently framed claim or claims—claims capable of being advanced under Section 1983 in the objective and subjective good faith demanded by Rule 11 — that is or are viable in light of *Downtown Auto Parks*. At the ensuing status hearing set for 9:00 a.m. December 30, 1993, this Court expects to act on the current motions in light of this opinion and of the content of any such filing.

Date: December 8, 1993.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 93 C 5860
Judge Shadur

O'HARE TRUCK SERVICE, INC. AND JOHN A. GRATZIANNA,
Plaintiffs,

v.

CITY OF NORTHLAKE, *et al.*,
Defendants.

Jury Demanded

FIRST AMENDED COMPLAINT

Now come the plaintiffs, O'Hare Truck Service, Inc. (hereinafter "O'Hare") and John A. Gratzianna and complain of the defendants, City of Northlake (hereinafter "Northlake"), Mayor Reid Paxson (here-inafter "Paxson"), Police Chief Seymour Sapoznik (hereinafter "Sapoznik") as follows:

JURISDICTION AND VENUE

1. This action is brought pursuant to 42 U.S.C. Section 1983 in that plaintiff has been deprived of his rights secured by the First and Fourteenth Amendments to the United States Consti-

tution, to wit, freedom of speech and due process of law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1331, 1334 and 2201. Venue lies in the district court for the Northern District of Illinois pursuant to 28 U.S.C. Section 1391, because all relevant acts occurred within this district.

PARTIES

2. The plaintiff, O'Hare Truck Service, Inc. is an Illinois corporation with its principal place of business in the City of Northlake, Cook County, Illinois. O'Hare Truck Service, Inc., in addition to other services, provides towing services at the request of municipalities throughout Cook and DuPage counties. O'Hare Truck Service, Inc. is owned and operated by plaintiff John A. Gratzianna.

3. The City of Northlake is a duly constituted municipal corporation and body politic, located in Cook County, Illinois.

4. Paxson is, at all relevant times herein, the Mayor of the City of Northlake and its principal policy maker. He is sued in his individual capacity.

5. Sapoznik is, at all relevant times herein, the Chief of Police of the City of Northlake. He gained and maintains his position as Chief of Police by appointment of defendant Paxson. He is sued in his individual capacity.

COUNT I -- FREEDOM OF SPEECH

6. The plaintiffs provide towing services to municipalities. When a need arises for the towing of a vehicle, as a result of an accident, mechanical breakdown, abandonment or other reason, plaintiff is contacted by the municipality in which the vehicle is located and asked to provide towing services. The plaintiffs earn a substantial part of their incomes from fees paid by

municipalities and private individuals as a result of requests for towing services by various municipalities.

7. In order to procure towing services under the circumstances described above, the Northlake Police Department has maintained and continues to maintain a towing rotation list (hereinafter "rotation list"). When the need for towing services arises in Northlake the police department contacts the towing service which is next in line on the rotation list and requests towing services.

8. It has been the policy and practice of Northlake and the Northlake Police Department since 1965 and before to request towing services from the rotation list. It has been the policy and practice of Northlake and the Northlake Police Department since at least 1965 that entities on the rotation list will not be removed from the rotation list without cause.

9. The plaintiff O'Hare has been on the Northlake rotation list since 1965 and has provided towing services at the request of Northlake since 1965 as a result of its placement on the rotation list.

10. The plaintiffs had a mutual understanding with former Mayor Gene Doyle (predecessor to defendant Paxson) and the City of Northlake that O'Hare would remain on the Northlake rotation list so long as the quality of its services were maintained. Shortly after the election of defendant Paxson to the office of Mayor of Northlake in 1989 he stated to plaintiff Gratzianna that he was pleased with the services provided by plaintiffs and would continue the policy of former Mayor Doyle to retain O'Hare, and others, on the rotation list so long as the quality of services were maintained.

11. In 1993 defendant Paxson ran for reelection to the position of Mayor of Northlake.

12. Although plaintiff John A. Gratzianna was solicited for campaign funds by Paxson's campaign committee, he refused

to contribute to Paxson's reelection campaign.

13. Instead, John A. Gratzianna openly supported Paxson's opponent for the office of Mayor. Campaign posters for Paxson's opponent were displayed at plaintiff O'Hare's place of business.

14. In retaliation for the activities described in paragraph 11 and 12, defendant Sapoznik, upon information and belief, at the direction of defendant Paxson, removed plaintiff O'Hare from the Northlake rotation list on or about July 8, 1993.

15. As a direct and proximate result of defendants' removal of plaintiff O'Hare from the towing rotation list the plaintiffs have lost substantial income.

16. At all relevant times herein it has been the policy and practice of Northlake, as set by defendant Paxson, to use the powers and authority of Northlake to retaliate against political opponents of defendant Paxson.

17. The actions of defendants Paxson and Sapoznik as described in paragraph 13 occurred in conformance with and as a result of the policy and practice of Northlake as described in paragraph 15.

18. As a direct and proximate result of the defendants' removal of plaintiff O'Hare from the towing rotation list the plaintiffs have suffered a chilling effect upon the exercise of their constitutional right of freedom of speech and have suffered harm and injury.

19. The actions of the defendants as described herein were taken intentionally and with callous indifference to plaintiffs' federal constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this court will grant the following relief:

A. A preliminary and permanent injunction restraining the defendant from continuing to violate plaintiffs' federally protected rights and ordering plaintiff O'Hare's return to the Northlake tow rotation list;

B. A declaratory judgment stating that defendants have violated plaintiffs' federally protected rights;

C. Judgment for compensatory damages in favor of the plaintiffs and against the defendants in an amount to be set by the jury in this matter;

D. Judgment for punitive damages in favor of the plaintiffs and against defendants Paxson and Sapoznik in an amount to be set by the jury in this matter;

E. An award for reasonable costs and attorney's fees as authorized by 42 U.S.C. Section 1988;

F. For such other relief as this court deems just.

COUNT II -- DUE PROCESS OF LAW

20. As and for paragraph 20 of Count II, the plaintiffs reallege and incorporate the allegations set forth in paragraphs 1 through 19 as if fully set forth here.

21. Despite a request from the plaintiffs, the defendants have at no time given any reason for the removal of plaintiff O'Hare from the tow rotation list. At all relevant times herein the towing services provided by plaintiffs at the request of defendants have been professional and competent.

22. The plaintiffs were not provided notice of O'Hare's removal from the tow rotation list; the plaintiffs were not provided an opportunity to object to O'Hare's removal from the tow rotation list; the plaintiffs were not provided a hearing at which to contest O'Hare's removal from the tow rotation list.

23. The plaintiffs had a property interest in O'Hare remaining on the tow rotation list and, therefore, had a right to due

process of law protected by the fourteenth amendment to the U.S. Constitution, prior to its removal from the rotation list.

24. The plaintiffs were denied their right to due process of law when defendants removed O'Hare from the tow rotation list without notice and an opportunity to object as described in paragraphs 20 and 21.

25. The actions of the defendants in denying plaintiffs' rights to due process of law were taken intentionally and with callous indifference to plaintiffs' federal constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this court will grant the following relief:

A. A preliminary and permanent injunction ordering plaintiff O'Hare's return to the Northlake tow rotation list;

B. A declaratory judgment stating that defendants have violated plaintiffs' federally protected rights;

C. Judgment for compensatory damages in favor of the plaintiffs and against the defendants in an amount to be set by the jury in this matter;

D. Judgment for punitive damages in favor of the plaintiffs and against defendants Paxson and Sapoznik in an amount to be set by the jury in this matter;

E. An award for reasonable costs and attorney's fees as authorized by 42 U.S.C. Section 1988;

F. For such other relief as this court deems just.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38, plaintiffs demand trial by jury.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 2 1995
OFFICE OF THE CLERK

No. 95-191

In The

Supreme Court of the United States

October Term, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

vs.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Citations	ii
Opinions Below	1
Statement of Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Denying the Writ	2
I. Procedural considerations require denial of Petitioners' request for a writ of certiorari.	3
A. The Result Petitioners' Seek Requires Reversal Of *Monell*; This Is Not Raised In The Petition.	3
II. Petitioners' characterization of this case as involving freedom of association provides no basis for this Court to grant certiorari.	5
A. *Umbehr* Is An Unwarranted Extension Of First Amendment Precedent Because It Fails To Properly Balance The Governmental Interest In Efficient Operations Against The Independent Contractor's First Amendment Rights.	5
Conclusion	10

Page

TABLE OF CITATIONS

Cases Cited:

Ambrose v. Knotts, 865 F. Supp. 342 (S.D. W. Va. 1994) .. 9

Blankman v. County of Nausau, 819 F. Supp. 198, 205 (E.D. N.Y. 1993), *aff'd without opinion*, 14 F.3d 592 (2d Cir. 1993) 9

Branti v. Finkl, 445 U.S. 507 (1980) 5, 7

Downtown Auto Parts, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005 (1991) 7, 8, 9

Elrod v. Burns, 427 U.S. 347 (1976) 5, 7

Fox & Company v. Schoemehl, 671 F.2d 303 (8th Cir. 1982) 9

Horn v. Kean, 796 F.2d 668 (3rd Cir. 1986) 8

LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984) 7, 8, 9

Lefkowitz v. Turley, 414 U.S. 70 (1973) 9

Lunblad v. Celeste, 874 F.2d 1097 (6th Cir. 1989), *vacated*, 882 F.2d 207, *reinstated in part*, 924 F.2d 627 (1991) (*en banc*), *cert denied*, 501 U.S. 1250 (1991) 8

Page

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 3, 4

O'Hare Truck Service, Inc. v. City of Northlake, 47 F.3d 883 (7th Cir. 1994) 8

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 4

Pembauer v. City of Cincinnati, 475 U.S. 469 (1986) 3

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 5, 6, 7

Selch v. Letts, 5 F.3d 1040 (7th Cir. 1993) 6, 9

Sweeney v. Bond, 669 F.2d 542 (8th Cir.), *cert. denied sub nom. Schenberg v. Bond*, 459 U.S. 878 (1982) 8, 9

Triad Associates, Inc. v. Chicago Housing Authority, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990) 7, 8, 9

Umbehr v. McClure, 44 F.3d 876 (10th Cir. 1995), *cert. granted sub nom. Heiser v. Umbehr*, __ U.S. __, 115 S. Ct. 2616 (*cert. granted* June 29, 1995) (No. 94-1654) 2, 5, 10

Vickery v. Jones, 856 F. Supp. 1313 (S.D. Ill. 1994) 7

Wilson v. Civil Town of Clayton, Indiana, 839 F.2d 375 (7th Cir. 1988) 3

Contents

	Page
United States Constitution Cited:	
First Amendment	2, 5, 8, 9
Fifth Amendment	9
Fourteenth Amendment	2
Fourteenth Amendment § 1	2
APPENDIX	
Appendix A — Judgment of United States Court of Appeals, Seventh Circuit Dated February 10, 1995 ...	1a
Appendix B — Notice of Issuance of Mandate With Bill of Costs Dated March 13, 1995	3a

No. 95-191

In The

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October Term, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

vs.

CITY OF NORTHLAKE, MAYOR REID PAXSON, AND POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, The City of Northlake, Mayor Reid Paxson and police chief Seymour Sapoznik, respectfully request that the Court deny Petitioners' request for a writ of certiorari.

OPINIONS BELOW

Respondents do not challenge Petitioners' listing of opinions.

STATEMENT OF JURISDICTION

Respondents do not challenge Petitioners' jurisdictional statement; however, Petitioners have not paid the Bill of Costs taxed by the Seventh Circuit Court of Appeals on March 13, 1995. (*See* Mandate and Bill of Costs attached hereto and incorporated herein in Appendix 1a-5a.)

STATUTORY PROVISIONS INVOLVED

Petitioners properly include Amendment I to the Constitution of the United States within the listing of constitutional provisions at issue. However, Petitioners' improperly list Amendment XIV, § 1 to the Constitution of the United States as no Fourteenth Amendment arguments are raised in the petition for writ of certiorari.

STATEMENT OF THE CASE

Respondents do not challenge Petitioners' statement of the case, but supplement it as follows: The District Court dismissed on qualified immunity grounds Petitioners' First Amended Complaint against the individual defendants; and, also dismissed Petitioners' due process claim. Petitioners did not appeal these rulings in the Seventh Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

The petition should be denied for the procedural reasons set forth below. Moreover, the Supreme Court should simply overturn the Tenth Circuit decision in *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995) *cert. granted sub nom. Heiser v. Umbehr*, __ U.S. __, 115 S. Ct. 2616 (*cert. granted* June 29, 1995) (No. 94-1654), which would obviate Petitioners' argument here.

I.

PROCEDURAL CONSIDERATIONS REQUIRE DENIAL OF PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI.

A. The Result Petitioners' Seek Requires Reversal Of *Monell;* This Is Not Raised In The Petition.

The individual defendants in this case were dismissed under the doctrine of qualified immunity and Petitioners do not contest this dismissal. Petitioners did not appeal this issue in the Seventh Circuit and have waived it here.

Petitioners now ask this Court to recognize a claim that would make Northlake responsible to pay Petitioners' damages, based on the actions of dismissed individuals. However, Petitioners also claim these individuals *violated* Northlake's official policy with respect to its list of towing operators.

Page four of the petition for writ of certiorari states that, "[I]t has been Northlake's policy and practice that companies on the rotation list will not be removed from the list without cause. Several mayors of Northlake, including Respondent Paxson and Paxson's predecessor, confirmed this policy and stated that O'Hare would remain on the rotation list so long as its quality of services was maintained."

This Court has stated that a municipality may only be liable for "acts which the municipality has officially sanctioned or ordered." *Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986). Therefore, municipal liability can "never be premised on the result of a random and unauthorized act." *Wilson v. Civil Town of Clayton, Indiana*, 839 F.2d 375, 379 (7th Cir. 1988). Nowhere do Petitioners allege evidence of, or even argue, that the actions

complained of against the individual defendants were the result of a new or changed city towing policy. Moreover, there are no allegations or argument that either the mayor or police chief had the *power and authority* to so change city policy. Petitioners' position is quite simply that the individual defendants *violated* city policy and Petitioners now seek to hold the municipality liable for this violation.

In effect, Petitioners are asking this Court to establish *respondeat superior* liability against the City of Northlake. Such a result would require overturning this Court's landmark decision, *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), which establishes that municipalities are not subject to *respondeat superior* liability in Section 1983 cases. Even though Petitioners seek this result, Petitioners never address this issue and their failure to raise it or give this Court any reason to consider it requires denial of the petition for writ of certiorari.

As indicated in *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions *presented in the petition.*" 471 U.S. at 816 (emphasis added). Petitioners did not raise the *Monell* issue at any point in this litigation and most specifically, did not raise it in their petition. Petitioners have waived this issue, consideration of which is essential to the relief sought. The Court cannot grant Petitioners the relief requested without considering and overturning *Monell*. Therefore, the petition is defective and must be denied.

II.

PETITIONERS' CHARACTERIZATION OF THIS CASE AS INVOLVING FREEDOM OF ASSOCIATION PROVIDES NO BASIS FOR THIS COURT TO GRANT CERTIORARI.

Petitioners describe this case as involving freedom of *association* as a reason it should be accepted for consideration together with *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995) *cert. granted sub nom., Helser v. Umbehr*, __ U.S. __, 115 S. Ct. 2616 (*cert. granted* June 29, 1995) (No. 94-1654), currently pending before this Court. However, it is clear that *Umbehr* is an unwarranted extension of First Amendment precedent; this Court should simply overturn *Umbehr* and deny Petitioners' request for a writ of certiorari.

A. *Umbehr* Is An Unwarranted Extension Of First Amendment Precedent Because It Fails To Properly Balance The Governmental Interest In Efficient Operations Against The Independent Contractor's First Amendment Rights.

The Supreme Court has consistently recognized that the governmental interest in *efficient operation* may outweigh an individual's First Amendment rights, under certain circumstances. Those circumstances exist where the individual's political loyalty is related to effective performance of the function involved. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkl*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In this, if not all cases involving independent contractors performing governmental services, Petitioners' political loyalty is related to effective performance of the function involved.

Insofar as independent contractors do not have supervisors who monitor their work, they are similar to the supervisors/

decision-makers the *Rutan* Court allowed to be selected or dismissed based on political affiliation. "A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." *Rutan*, 497 U.S. at 74.

For example, in *Selch v. Letts*, 5 F.3d 1040, 1042 (7th Cir. 1993) the Seventh Circuit held that political affiliation was a proper basis for firing an Indiana State Highway Subdistrict Superintendent. The court observed:

> There is significant evidence in political life that the failure to properly provide public services, such as snow removal from highways, will adversely impact on the chief executive of a state or local government charged with providing such services. *See Tomczak*, 765 F.2d at 641 ("Indeed, one of the biggest, if not the biggest, turning points in the 1979 Chicago mayoral election involved the provision of snow removal services.").

Selch, id. at 1046.

The court also recognized that there is no need to show actual disruption or inefficiency. Once the classification is made as exempt from First Amendment protection, political firing is permissible. *Selch v. Letts*, 5 F.3d 1040, 1047.

This analysis doesn't change if the governmental service is provided by an independent contractor instead of a governmental employee. In fact, there is even more reason to allow the governmental entity latitude in discharging an independent contractor.

First, unlike an employee where direct supervision is available, the power of termination is the only sure way to exert control over an independent contractor. Any limitation on governmental ability to terminate, or not rehire, an independent contractor would effectively destroy the ability to control public services. Employees are subject to their employer's control and direction over details of their work; independent contractors are not subject to such direct supervision. *See, e.g., Vickery v. Jones*, 856 F. Supp. 1313 (S.D. Ill. 1994) (discussing practical differences between control held over temporary-employees compared to the lack of control over independent contractors).

The Seventh Circuit has consistently declined to extend *Elrod-Branti-Rutan* to independent contractors. *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984); *Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990); *Downtown Auto Parts, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005 (1991).

In *LaFalce*, the Seventh Circuit considered a claim by a sign company whose low bid to install and maintain benches along city streets was rejected, because it did not support the mayor. In rejecting the argument that independent contractors would be discouraged from expressing their true political views if it might cost them their job, the court stated:

> If the contractor does not get the particular government contract on which he bids, because he is on the outs with the incumbent . . . it is not the end of the world for him; *there are other government entities to bid to, and private ones as well.* It is not like loosing your job.

Id., 712 F.2d at 294 (emphasis added).

Following *LaFalce*, the Seventh Circuit in *Triad* revisited the issue of extending First Amendment protection to independent contractors. Triad Associates was a security firm hired by the Chicago Housing Authority to provide security services. Following a change in mayoral administrations, Triad alleged that the new CHA chairman began to harass, intimidate and ultimately drive out Triad, other white employees and contractors in favor of black employees and contractors who favored the new administration. The Seventh Circuit affirmed dismissal relying on *LaFalce*, as well as the Third Circuit's decision in *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986).

In *Downtown Auto Parks*, the Seventh Circuit again considered the issue of whether to extend First Amendment protection to independent contractors. This case involved a parking garage operator whose contract was not renewed after the operator publicly challenged the City administration. The Seventh Circuit reaffirmed its decision in *LaFalce* and *Triad*. The court then cited numerous cases from other circuits and concluded that "we continue to concur in the view taken by the other circuits and hold that political favoritism in the awarding of public contracts is not actionable." *Id.; citing Sweeney v. Bond*, 669 F.2d 542 (8th Cir.), *cert. denied sub nom. Schenberg v. Bond*, 459 U.S. 878 (1982); *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986); and *Lunblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989), *vacated*, 882 F.2d 207, *reinstated in part*, 924 F.2d 627 (1991) (*en banc*), *cert. denied*, 501 U.S. 1250 (1991).

Finally, the Seventh Circuit again affirmed the continuing validity of *LaFalce*, *Triad* and *Downtown Auto Parks* in the present case. *O'Hare Truck Service, Inc. v. City of Northlake*, 47 F.3d 883, 884-5 (7th Cir. 1994).

Similar to the Seventh Circuit analysis in *Selch v. Letts*, *supra*, the Eighth Circuit, in *Sweeney*, *supra*, held that Missouri motor vehicle fee agents were not protected from dismissal based on political affiliation. *Sweeney*, 669 F.2d at 545-6. The court noted that political party affiliation was a proper requirement for effective job performance given the nature of plaintiffs' positions which placed them in contact with the electorate, independent of the restraints of typical civil service requirements. *Id.*, 669 F.2d at 546. *See also, Fox & Company v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982); *Ambrose v. Knotts*, 865 F. Supp. 342 (S.D. W. Va. 1994) (considering cases and refusing to extend free speech protection to independent contractors); *Blankman v. County of Nausau*, 819 F. Supp. 198, 205 (E.D.N.Y. 1993) (no protected free speech, association or equal protection claims where plaintiffs allege political motivation and denial of public contract), *aff'd without opinion*, 14 F.3d 592 (2d Cir. 1993).

Petitioners' citation to a Fifth Amendment case, *Lefkowitz v. Turley*, 414 U.S. 70 (1973) does not change this analysis. The fact that an independent contractor retains rights against self-incrimination under the Fifth Amendment does not affect the efficient operation of government. In contrast, an independent contractor can seriously impair the efficient operation of government simply by not fully or only lackadaisically performing the function involved. If such contractors support the political opposition, it is easy to see the disincentive for such performance of the function. Every attempt to then increase efficiency through termination would result in a federal lawsuit.

In each of the last three Seventh Circuit cases involving independent contractors' First Amendment claims, the Supreme Court has denied certiorari. *LaFalce, supra; Triad, supra; Downtown Auto Parks, supra.* Petitioners provide this Court with no "special or important reason" to reach a different result in this case.

CONCLUSION

The petition for certiorari should be denied. The petition should not be held pending the resolution of *Heiser.*

Respectfully submitted,

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APPENDIX A—JUDGMENT OF UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT DATED FEBRUARY 10, 1995

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Date: February 10, 1995

BEFORE: Honorable DONALD P. LAY, Circuit Judge*

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

No. 94-1222

O'HARE TRUCK SERVICE, INCORPORATED and JOHN A. GRATZIANNA,

Plaintiffs-Appellants

v.

CITY OF NORTHLAKE, an Illinois Municipal Corporation and Body Politic, REID PAXSON, Mayor and SEYMOUR SAPOZNIK, Police Chief

Defendants-Appellees

JUDGMENT — WITH ORAL ARGUMENT

---

* The Honorable Donald P. Lay, of the Eighth Circuit, sitting by designation.

Appendix A

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 93 C 5860, Milton I. Shadur, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B—NOTICE OF ISSUANCE OF MANDATE WITH BILL OF COSTS DATED MARCH 13, 1995

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

DATE: March 13, 1995

TO: H. Stuart Cunningham
United States District Court
Northern District of Illinois
219 S. Dearborn Street
Chicago, IL 60604

FROM: Thomas F. Strubbe, Clerk

Re: 94-1222
O'Hare Truck Service v. City Northlake
93 C 5860, Milton I. Shadur, Judge

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

• • •

[x] Original record on appeal consisting of:

ENCLOSED: TO BE RETURNED AT LATER DATED

Volumes of pleadings [1]

Appendix B

• • •

Copies of this notice sent to: Counsel of record

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date:_____ _____
(1071-010891) Deputy Clerk, U.S. District Court

Appendix B

BILL OF COSTS

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Dated: March 13, 1995

Taxed in favor of: CITY OF NORTHLAKE, REID PAXON, mayor and SEYMOUR SAPOZNIK, police chief,

Plaintiffs-Appellants

Appeal No. 94-1222

O'HARE TRUCK SERVICE, INCORPORATED and JOHN A. GRATZIANNA,

Plaintiffs-Appellants

v.

CITY OF NORTHLAKE, an Illinois Municipal Corporation and Body Politic, REID PAXSON, Mayor and SEYMOUR SAPOZNIK, POLICE CHIEF,

Defendants-Appellees

Appendix B

Appellate Court No. 94-1222 Docketed on: 1/31/94
Short Caption: O'Hare Truck Service vs City Northlake
District Court Judge: Milton I. Shadur
District Court No.: 93 C 5860

* * *

3. Reproduction of Briefs:_____ $230.70

Total $230.70

(3)

Supreme Court, U.S.
FILED
OCT 27 1995
CLERK

No. 95-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

9 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

I. There Are No Procedural Impediments To Granting Certiorari 2

II. This Case Raises Distinct Associational Issues Which Require This Court's Consideration 4

Conclusion 6

TABLE OF AUTHORITIES

Page

Elrod v. Burns, 427 U.S. 347 (1976) 4

Umbehr v. McClure, 44 F.3d 876 (10th Cir. 1995), *cert. granted sub nom. Heiser v. Umbehr*, __ U.S. __, 115 S.Ct. 2616 (*cert. granted* June 29, 1995) (No. 94-1654) 4

Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621 (9th 1988) 3

Leatherman v. Tarrant County Narcotics Unit, __ U.S. __, 113 S.Ct. 1160 (1993) 2, 3

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 2

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 4

Selch v. Letts, 5 F.3d 1040 (7th Cir. 1993) 5

No. 95-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

I.
THERE ARE NO PROCEDURAL IMPEDIMENTS TO GRANTING CERTIORARI.

In an attempt to construct what they term "procedural considerations" as a barrier to granting certiorari, respondents argue for the very first time in this litigation that petitioners' suit against the City of Northlake is precluded by this Court's decision in *Monell v. New York City Department of Social Services* 436 U.S. 658 (1978). Respondents erroneously assert that petitioners have charged that the conduct of the individual defendants was in violation of the City's policy, rather than in conformity with governmental policy as required by *Monell*. Respondents' Brief in Opposition, 3-4 (hereinafter, "Opp. Cert. ___").

An examination of petitioners' First Amended Complaint (hereinafter, "complaint"), the allegations of which must be accepted as true in reviewing a decision granting a motion to dismiss, *Leatherman v. Tarrant County Narcotics Unit*, __ U.S. __, 113 S.Ct. 1160 (1993), reveals the fallaciousness of respondents' argument. In framing their First Amendment claim, petitioners allege that the Mayor was authorized to make policy, established a municipal policy of political retaliation, and acted pursuant to that policy when he ordered that petitioners be denied future towing business. Specifically, the allegations of the complaint state: (1) that respondent Mayor Paxson was at all relevant times, "the principal policy maker" for the City (Petition for Certiorari, Appendix, 21a, ¶ 4) (hereinafter "App. __"); (2) that respondent Police Chief Sapoznik, at the direction of the respondent Mayor, removed O'Hare from the rotation list in retaliation for petitioner Gratzianna refusing to support the Mayor's campaign for re-election (App. 22a-23a, ¶¶ 11, 12, 14); (3) that "it has been the policy and practice of Northlake, as set

by defendant Paxson, to use the powers and authority of Northlake to retaliate against political opponents of defendant Paxson" (App. 23a, ¶ 16); and, (4) that the actions of the mayor and police chief, "occurred in conformance with and as a result of the policy and practice of Northlake...." (*Id.*, ¶ 17). These allegations succinctly state a claim of municipal liability under *Monell* and its progeny.

Though petitioners did allege, for purposes of establishing a protectible due process interest, that prior to this incident Northlake had a policy and practice of participation in the towing program based on merit (App. 22a, ¶¶ 9-10), that allegation is not inconsistent with petitioners' further claim that, in this instance, respondents were acting pursuant to a policy of retaliatory termination. Moreover, it is clear from the complaint that such retaliation, in its application to towing services, represented a change in policy or a new policy. Respondents themselves recognize this fact. (Opp. Cert., 3-4).

Petitioners need not, as respondents argue, provide "evidence" as to whether retaliation was a new or changed policy. *Leatherman* specifically rejected a heightened pleading standard for cases alleging municipal liability under § 1983. In so doing, it resolved a conflict among the circuit courts, favoring those decisions exemplified by *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621 (9th 1988). *Leatherman*, 113 S.Ct at 1161-62. *Karim-Panahi*, as recognized by this Court, reaffirmed circuit law that a claim of municipal liability under § 1983 will be sustained on a bare allegation that wrongful conduct conformed to official policy, custom or practice. *Id.*

Respondents' tactic of characterizing petitioners' claim as asserting respondeat superior liability and requiring the reversal of *Monell* is completely baseless. Petitioners have conformed their pleadings to the requirements of *Monell*

and *Leatherman* and seek to establish liability against the City of Northlake because the constitutional injury to petitioners was inflicted pursuant to municipal policy, not in contravention of it.

II.
THIS CASE RAISES DISTINCT ASSOCIATIONAL ISSUES WHICH REQUIRE THIS COURT'S CONSIDERATION.

1. Respondents further argue that this Court should not grant review in this case and instead, should resolve the important associational issues raised in our Petition when it renders its decision in *Heiser v. Umbehr*, No. 94-1654. (Decision below, *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995).) This Court should reject this suggestion because the interests presented in this case which involve political association and patronage are not raised by the free speech issue in *Heiser*.

Under the general rubric of "preservation of democratic process," this Court has identified a number of specific interests as relevant to the constitutionality of patronage-type practices. *Elrod v. Burns*, 427 U.S. 347 (1976). These include the role of partisan politics and the stability of the two-party system. *Id. See also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 104-110 (1990) (Scalia, J. dissenting). While these interests are clearly implicated in this case (Opp. Cert. 5-9), they are not at issue in *Heiser* where the Tenth Circuit correctly found that this Court's patronage cases were of only "limited relevance." *Umbehr*, 44 F.3d at 883. Furthermore, in briefings before this Court, both parties in Heiser have stated that Mr. Umbehr's political association was not involved in the termination of his contract with

Wabaunsee County. (Brief of Petitioner at 15; Brief of Respondent at 26-27).

2. Respondents seek to establish the correctness of the decision below asserting that "[i]n this, if not all cases, involving independent contractors performing governmental services, Petitioners' political loyalty is related to effective performance of the function involved." (Opp. Cert. 5) However, respondents' implicit admission that in some instances, political loyalty is not required of governmental contractors, counsels the acceptance of the case for review. There should be no blanket exception to basic rights of political association for independent contractors. In fact, in the case relied upon by respondents to support this proposition, *Selch v. Letts*, 5 F.3d 1040 (7th Cir. 1993), the Seventh Circuit engaged in a detailed functional analysis of the duties of the employees before deciding whether political affiliation was a valid employment requirement. *Id.* at 1045-47.

Respondents also seem to suggest that *Selch* supports allowing government to consider political affiliation whenever independent contractors provide public services such as maintenance of the highways. (Opp. Cert. 6). However, the *Selch* Court found political association to be a valid consideration only because the supervisory level employee had the authority to decide where and when work was to be completed and because he was responsible for investigating and responding to complaints from the public. *Selch*, 5 F.3d at 1046-1047. Petitioners, like many government contractors, simply do not possess that type of discretion or authority and provide services within a narrowly defined area. This Court should, as requested in our Petition, determine the circumstances and standards under which government may, if ever, consider the political association of those contractors to whom it gives business.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold the petition for rehearing pending the resolution of *Heiser*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 19 1996
CLERK

No. 95-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 31, 1995
CERTIORARI GRANTED DECEMBER 8, 1995

33 pp

TABLE OF CONTENTS

Page

Relevant Court Docket Entries
United States District Court for the
Northern District of Illinois (Chicago) 1
United States Court of Appeals for the
Seventh Circuit 6

Plaintiffs' Original Complaint,
September 24, 1993 13

Defendants' 12(b)(6) Motion to Dismiss,
December 10, 1993 22

Defendants' Motion for Summary Judgment,
December 10, 1993 26

The following opinions, orders, and pleadings have been omitted in printing this joint appendix because they appear on the following pages in the appendix to either the Petition for Writ of Certiorari ("P.A.") or in the appendix to the Respondents' Brief in Opposition ("R.A.")

Memorandum, Opinion, and Order,
December 8, 1993 ..... P.A. 16a

Plaintiffs' First Amended Complaint,
December 30, 1993 ..... P.A. 20a

Memorandum, Opinion, and Order dismissing case,
January 3, 1994 ..... P.A. 10a

Order of United States Court of Appeals
for the Seventh Circuit affirming
district court's dismissal of case,
February 10, 1995 ..... P.A. 2a

Order of United States Court of Appeals
for the Seventh Circuit filing final judgment
per opinion with costs,
February 10, 1995 ..... R.A. 1a

Order of United States Court of Appeals
for the Seventh Circuit denying Petition
for Rehearing, March 3, 1995 ..... P.A. 1a

Mandate issued with bill of costs,
March 13, 1995 ..... R.A. 3a

U.S. District Court
Northern District of Illinois (Chicago)

CIVIL DOCKET FOR CASE #: 93-CV-5860

O'Hare Truck Svc Inc, et al v. Northlake, Cty of, et al
Filed: 09/24/93
Assigned to: Hon. Milton I. Shadur
Jury Demand: Both
Demand: $0,000
Nature of Suit: 440
Jurisdiction: Federal question
Lead Docket: None
Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

9/24/93	1	COMPLAINT; jury demand - civil cover sheet - Appearance(s) of Thomas C. Crooks as attorney(s) for plaintiff with Rule 39 affidavit (three original and three copies summons(es) (Documents: 1-1 through 1-4) (is) [Entry date 09/27/93]
9/29/93	2	MEMORANDUM OPINION AND ORDER (is) [Entry date 09/30/93]
9/29/93	3	MINUTE ORDER of 9/29/93 by Hon. Milton I. Shadur: Memorandum opinion and order entered. Accordingly, the words "official and" are stricken from both complaint paragraph 4 and 5. Mailed notice (is) [Entry date 09/30/93]
10/22/93	4	MOTION by defendants to vacate any and all

defaults heretofore entered against them, for leave to file instanter, their appearance and, for a 28 day extension of time within which to answer or otherwise plead to plaintiffs' complaint; Notice of motion (is) [Entry date 10/25/93]

10/22/93 5 MINUTE ORDER of 10/22/93 by Hon. Milton I. Shadur: Status hearing set for 12/07/93 at 9:00 a.m. Leave is granted to Gary Feiereisel, Frank Kasbohm, Matthew VanCleave and Corey Grauer to file their appearances as counsel on behalf of defendants. Granting defendants' motion to vacate any and all defaults [4-1], for leave to file appearance [4-2] and for an extension of time to November 25, 1993 within which to answer or otherwise plead [4-3]. Mailed notice (is) [Entry date 10/25/93]

12/8/93 12 MEMORANDUM, OPINION, AND ORDER (tlm) [Entry date 01/07/94]

12/8/93 13 MINUTE ORDER of 12/8/93 by Hon. Milton I. Shadur: Plaintiffs' memorandum identifying relevant authority, or plaintiffs' amended complaint is due by 12/28/93. Mailed notice (tlm)[Entry date 01/07/94]

12/10/93 14 MOTION by defendants for leave to file response to compliant [sic] instanter. (tlm) [Entry date 01/07/94]

12/10/93 15 MOTION by defendants to dismiss for lack of jurisdiction. (tlm) [Entry date 010/94]

12/10/93 16 MOTION by defendants for summary judgment. (tlm) [Entry date 01/07/94]

12/10/93 17 NOTICE OF MOTION by defendants regarding motion for leave to file response to complaint instanter [14-1], regarding motion to dismiss for lack of jurisdiction [15-1], regarding motion for summary judgment [16-1] (tlm) [Entry date 01/07/94]

12/10/93 18 MINUTE ORDER of 12/10/93 by Hon. Milton I. Shadur: Granting defendants' motion for leave to file 12(b)(6) motion to dismiss and motion for summary judgment. [14-1] No notice (tlm) [Entry date 01/07/94]

12/30/93 19 MOTION by plaintiff for leave to file first amended complaint and memorandum of law. (tlm) [Entry date 01/07/94]

12/30/93 20 FIRST AMENDED COMPLAINT [1-1] by plaintiff; jury demand (tlm) [Entry date 01/07/94]

12/30/93 21 MEMORANDUM of law by defendants [sic][1] regarding the order of 12/08/93 (Exhibits). (tlm) [Entry date 01/07/94]

12/30/93 22 NOTICE OF FILING by defendants regarding motion for leave to file first amended complaint and memorandum of law [19-1], complaint [20-1] and memorandum [20-1]. (tlm)

---

[1] This docket entry is erroneous. The memorandum was submitted by the plaintiffs, not the defendants.

[Entry date 01/07/94]

1/3/94 23 MEMORANDUM, OPINION, AND ORDER dismissing case (Attachment). (tlm) [Entry date 01/07/94] [Edit date 04/01/94]

1/3/94 24 MINUTE ORDER of 1/3/94 by Hon. Milton I. Shadur: Memorandum Opinion and Order entered. Accordingly, plaintiffs' motion for leave to file first amended complaint and memorandum of law [19-1] is granted. This action is dismissed with prejudice. terminating [sic] case No notice (tlm) [Entry date 01/07/94]

1/3/94 25 ENTERED JUDGMENT (tlm) [Entry date 01/07/94]

1/28/94 26 NOTICE OF APPEAL by John A. Gratzianna, O'Hare Truck Svc Inc from motion minute order [24-2] (Fee Paid) (pw) [Entry date 01/31/94]

1/28/94 27 LETTER regarding jurisdictional statement acknowledged by John A. Gratzianna, O'Hare Truck Svc Inc. (pw) [Entry date 01/31/94]

2/11/94 -- TRANSMITTED 02/11/94 complete record on appeal to USCA for the 7th Circuit consisting of transmittal letter, certificate, one volume of pleadings and a list of documents. (gm) [Entry date 02/14/94]

3/14/95 30 LETTER from the USCA for the 7th Circuit Court informing the Clerk's Office that the

record on appeal, regarding appeal [26-1] will be forwarded at a later date (94-1222). (ll) [Entry date 03/28/95)

3/14/95 31 BILL OF COSTS submitted by the United States Court of Appeals (94-1222). (ll) [Entry date 03/28/95]

3/14/95 32 CERTIFIED COPY of order from the USCA for the 7th Circuit entered 02/01/95: It is ordered and adjudged Affirming the District Court is Affirmed, with costs, in accordance with the decision of this court entered on this date (94-1222). (ll) [Entry date 03/28/95]

3/14/95 33 OPINION from the USCA for the 7th Circuit argued 09/12/94; decided 02/10/95. appeal [26-1] (94-1222). (ll) [Entry date 03/28/95]

GENERAL DOCKET
U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

94-1222

Nsuit: 3440 Oth Civil Rights-Fed. Question
O'Hare Truck Service, et al v. City Northlake, et al
Appeal from: United States District Court
civil - private - none
Fee status: paid

Case Associations

Prior cases:
None
Current cases:
None

Lower Court Information

Northern District of Illinois, Eastern Division:
93 C 5860
Court Reporter: J. Andrews, Court Reporter
Ordering Judge: Milton I. Shadur, Judge
Date Filed: 9/24/93
Date order/judgment: 1/3/94
Date NOA filed: 1/28/94

Caption

O'HARE TRUCK SERVICE, INCORPORATED and
JOHN A. GRATZIANNA,
Plaintiffs - Appellants

v.

CITY OF NORTHLAKE, an Illinois Municipal Corporation and Body Politic, REID PAXSON, Mayor and SEYMOUR SAPOZNIK, Police Chief,
Defendants - Appellees

Counsel Information

O'HARE TRUCK SERVICE, INCORPORATED Plaintiff - Appellant	Thomas C. Crooks 312/641-2260 Suite 535 [COR LD NTC ret] 70 W. Madison Street Three First National Plaza Chicago, IL 60602 USA Michael P. McGovern 615/523-9191 [COR LD NTC ret] 709 Market Street Knoxville, TN 37902 USA
JOHN A. GRATZIANNA Plaintiff - Appellant	Thomas C. Crooks (see above) [COR LD NTC ret] Michael P. McGovern (see above) [COR LD NTC ret]

v.

CITY OF NORTHLAKE, an Illinois Municipal Corporation and Body Politic Defendant - Appellee	Matthew E. VanCleave 312/782-9255 Suite 3400 [COR LD NTC tr] Gary Feiereisel 312/782-9255 Suite 3400 [COR LD NTC ret] Frank Kasbohm 312/782-9255 Suite 3400 [COR LD NTC ret] FRATERRIGO, BEST & BERANEK 55 W. Monroe Street Chicago, IL 60603 USA
SEYMOUR SAPOZNIK, Police Chief Defendant - Appellee	Matthew E. VanCleave (see above) [COR LD NTC tr] Gary Feiereisel (see above) [COR LD NTC ret] Frank Kasbohm (see above) [COR LD NTC ret]
REID PAXSON, Mayor Defendant - Appellee	Matthew E. VanCleave (see above) [COR LD NTC tr] Gary Feiereisel

	(see above) [COR LD NTC ret] Frank Kasbohm (see above) [COR LD NTC ret]

1/31/94	Private civil case docketed. [94-1222] [570179-1] Appearance form due on 3/24/94 for Frank Kasbohm, for Gary Feiereisel, for Corey H. Grauer, for Matthew E. VanCleave, for Thomas C. Crooks. Transcript information sheet due 2/10/94 for Thomas C. Crooks. Appellant's brief due 3/14/94 for O'Hare Truck Service, for John A. Gratzianna. Jurisdictional statement due 2/4/94 for O'Hare Truck Service, for John A. gratzianna. (carl)
2/4/94	Filed Appellant O'Hare Truck Service, appellant John A. Gratzianna jurisdictional statement. [94-1222] [570179-1] (patb)
2/11/94	Original record on appeal filed. Contents of record: 1 vol. pleadings; . [94-1222] [574541-1] (odea)
2/14/94	Filed Appellee City Northlake, Appellee Seymour Sapoznik, Appellee Reid Paxson jurisdictional statement. [94-1222] [574586-1] (chuc)
4/22/94	Filed 15c appellant's brief by O'Hare Truck Service, John A. Gratzianna. [94-1222] [597508-1] (chry)
5/23/94	Filed motion by Appellee City Northlake,

Appellee Seymour Sapoznik, Appellee Reid Paxson for sanctions against appellants. [607981-1] [94-1222] (chry)

5/23/94 Filed 15c appellee's brief by city Northlake, Seymour Sapoznik, Reid Paxson. [94-1222] [608001-1] (chry)

5/25/94 ORDER: Filed clerk's notice to Appellant O'Hare Truck Service, Appellant John A. Gratzianna to file a response to MOTION FOR SANCTIONS filed 5/23/94. [608035-1] am [94-1222] Response due 6/3/94 for John A. Gratzianna, for O'Hare Truck Service (chry)

6/3/94 Filed Appellant O'Hare Truck Service, Appellant John A. Gratzianna response to Appellee City Northlake, Appellee Seymour Sapoznik, Appellee Reid Paxson motion for sanctions. [611384-1] Document [608035-1] [94-1222][611384-1] (chr)

6/6/94 Filed 15c appellant's reply brief by O'Hare Truck Service, John A. Gratzianna [94-1222] [611433-1] (chry)

6/16/94 IT IS ORDERED that the following motion(s) and/or document(s) shall be taken with the case for determination by the merits panel: Motion for sanctions and the response thereto. [614441-1] am [94-1222] (carl)

2/10/95 Filed opinion of the court by Judge Kanne. AFFIRMED. Lay, Easterbrook, Kanne. [94-1222] [570179-1] (jenp)

2/10/95 ORDER: Final judgment filed per opinion. With costs: y. [94-1222] [693147-1] (jenp)

2/13/95 Filed motion by Appellees City Northlake, Seymour Sapoznik and Reid Paxson to expedite ruling on Motion for Sanctions filed 5/23/94. [694214-1] [94-1222] (juli)

2/17/95 Filed Appellee City Northlake, Appellee Seymour Sapoznik, Appellee Reid Paxson Bill of costs in the amount of $230.70. [94-1222] [570179-1] (fran)

2/23/95 ORDER issued DENYING motion to expedite ruling on the appellees' motion for sanctions which was taken with the case. Sanctions in this appeal are not proper. [694214-1] AM [94-1222] (juli)

2/24/95 Filed 15c Petition for Rehearing by appellant John a. Gratzianna, appellant O'Hare Truck Service. Dist. [94-1222] [647824-1] (jimm)

3/3/95 ORDER: Appellant John a. Gratzianna, Appellant O'Hare Truck Service Petition for Rehearing is DENIED. [94-1222] [697824-1] (jimm)

3/13/95 MANDATE ISSUED WITH BILL OF COSTS IN THE AMOUNT OF $230.70. RECORD ON APPEAL TO BE RETURNED LATER. (Contents to be returned: 1 vol. pleadings.) [94-1222] [694214-1] (jimm)

4/4/95 ORDER: The opinion of this Court issued on

February 10, 1995 is corrected follows: Page 7, footnote 4, line 3, "Miller" should be replaced with "Morris". [94-1222- [570179-1] (jimm)

6/1/95 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 7/31/95. [570179-1] [94-1222] (patb)

8/7/95 Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 95-191. [94-1222] [750202-1] (jame)

12/15/95 Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 95-191. The petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 3:00 p.m., Friday, January 19, 1996. The respondents' brief is to be filed with the Clerk and served upon opposing counsel on or before 3:00 p.m., Friday, February 16, 1996. Rule 29.2 does not apply. [94-1222] [788485-1] (elea)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

O'HARE TRUCK SERVICE, INC., and JOHN A. GRATZIANNA,	)	
Plaintiffs,	)	NO. 93 C 5860
vs.	)	JURY DEMANDED
CITY OF NORTHLAKE, an Illinois Municipal Corporation and Body Politic, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,	)	JUDGE SHADUR
Defendants.	)	

COMPLAINT

Now come the plaintiffs, O'Hare Truck Service, Inc. (hereinafter "O'Hare") and John A. Gratzianna and complain of the defendants, City of Northlake (hereinafter "Northlake"), Mayor Reid Paxson (hereinafter "Paxson"), Police Chief Seymour Sapoznik (hereinafter "Sapoznik") as follows:

JURISDICTION AND VENUE

1. This action is brought pursuant to 42 U.S.C. Section 1983 in that plaintiff has been deprived of his rights

secured by the First and Fourteenth Amendments to the United States Constitution, to wit, freedom of speech and due process of law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1331, 1334 and 2201. Venue lies in the district court for the Northern District of Illinois pursuant to 28 U.S.C. Section 1391, because all relevant acts occurred within this district.

PARTIES

2. The plaintiff, O'Hare Truck Service, Inc. is an Illinois corporation with its principal place of business in the City of Northlake, Cook County, Illinois. O'Hare Truck Service, Inc., in addition to other services, provides towing services at the request of municipalities throughout Cook and DuPage counties. O'Hare Truck Service, Inc. is owned and operated by plaintiff John A. Gratzianna.

3. The City of Northlake is a duly constituted municipal corporation and body politic, located in Cook County, Illinois.

4. Paxson is, at all relevant times herein, the Mayor of the City of Northlake and its principal policy maker. He is sued in his official and individual capacity.

5. Sapoznik is, at all relevant times herein, the chief of Police of the City of Northlake. He gained and maintains his position as Chief of Police by appointment of defendant Paxson. He is sued in his official and individual capacity.

COUNT I - FREEDOM OF SPEECH

6. The plaintiffs provide towing services to municipalities. When a need arises for the towing of a vehicle, as a result of an accident, mechanical breakdown, abandonment or other reason, plaintiff is contacted by the municipality in which the vehicle is located and asked to provide towing services. The plaintiffs earn a substantial part of their incomes from fees paid by municipalities and private individuals as a result of requests for towing services by various municipalities.

7. In order to procure towing services under the circumstances described above, the Northlake Police Department has maintained and continues to maintain a towing rotation list (hereinafter "rotation list"). When the need for towing services arises in Northlake the police department contacts the towing service which is next in line on the rotation

list and requests towing services.

8. It has been the policy and practice of Northlake and the Northlake Police Department since 1965 and before to request towing services from the rotation list.

9. The plaintiff O'Hare has been on the Northlake rotation list since 1965 and has provided towing services at the request of Northlake since 1965 as a result of its placement on the rotation list.

10. In 1993 defendant Paxson ran for reelection to the position of Mayor of Northlake.

11. Although plaintiff John A. Gratzianna was solicited for campaign funds by Paxson's campaign committee, he refused to contribute to Paxson's reelection campaign.

12. Instead, John A. Gratzianna openly supported Paxson's opponent for the office of Mayor. Campaign posters for Paxson's opponent were displayed at plaintiff O'Hare's place of business.

13. In retaliation for the activities described in paragraphs 11 and 12, defendant Sapoznik, upon information and belief, at the direction of defendant Paxson, removed plaintiff O'Hare from the Northlake rotation list on or about

July 8, 1993.

14. As a direct and proximate result of defendants' removal of plaintiff O'Hare from the towing rotation list the plaintiffs have lost substantial income.

15. At all relevant times herein it has been the policy and practice of Northlake, as set by defendant Paxson, to use the powers and authority of Northlake to retaliate against political opponents of defendant Paxson.

16. The actions of defendants Paxson and Sapoznik as described in paragraph 13 occurred in conformance with and as a result of the policy and practice of Northlake as described in paragraph 15.

17. As a direct and proximate result of the defendants' removal of plaintiff O'Hare from the towing rotation list the plaintiffs have suffered a chilling effect upon the exercise of their constitutional right of freedom of speech and have suffered harm and injury.

18. The actions of the defendants as described herein were taken intentionally and with callous indifference to plaintiffs' federal constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs prays that this court will grant the following relief:

A. A preliminary and permanent injunction restraining the defendants from continuing to violate plaintiffs' federally protected rights and ordering plaintiff O'Hare's return to the Northlake tow rotation list;

B. A declaratory judgment stating that defendants have violated plaintiffs' federally protected rights;

C. Judgment for compensatory damages in favor of the plaintiffs and against the defendants in an amount to be set by the jury in the matter;

D. Judgment for punitive damages in favor of the plaintiffs and against defendants Paxson and Sapoznik in an amount to be set by the jury in this matter;

E. An award for reasonable costs and attorney's fees as authorized by 42 U.S.C. Section 1988;

F. For such other relief as this court deems just.

COUNT II - DUE PROCESS OF LAW

19. As and for paragraph 19 of Count II, the plaintiffs reallege and incorporate the allegations set forth in paragraphs 1 through 18 as if fully set forth here.

20. Despite a request from the plaintiffs, the defendants have at no time given any reason for the removal of plaintiff O'Hare from the tow rotation list.

21. The plaintiffs were not provided notice of O'Hare's removal from the tow rotation list; the plaintiffs were not provided an opportunity to object to O'Hare's removal from the tow rotation list; the plaintiffs were not provided a hearing at which to contest O'Hare's removal from the tow rotation list.

22. The plaintiffs had a property interest in O'Hare remaining on the tow rotation list and, therefore, had a right to due process of law protected by the fourteenth amendment to the U.S. Constitution, prior to its removal from the rotation list.

23. The plaintiffs were denied their right to due process of law when defendants removed O'Hare from the tow rotation list without notice and an opportunity to object as described in paragraphs 20 and 21.

24. The actions of the defendants in denying plaintiffs' rights to due process of law were taken intentionally

and with callous indifference to plaintiffs; federal constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs prays that this court will grant the following relief:

A. A preliminary and permanent injunction ordering plaintiff O'Hare's return to the Northlake tow rotation list;

B. A declaratory judgment stating that defendants have violated plaintiffs' federally protected rights;

C. Judgment for compensatory damages in favor of the plaintiffs and against the defendants in an amount to be set by the jury in this matter;

D. Judgment for punitive damages in favor of the plaintiffs and against defendants Paxson and Sapoznik in an amount to be set by the jury in this matter;

E. An award for reasonable costs and attorney's fees as authorized by 42 U.S.C. Section 1988;

F. For such other relief as this court deems just.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38, plaintiffs demand trial by jury.

Respectfully submitted,

_____

Thomas C. Crooks
Attorney for the Plaintiffs

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(312) 641-2260

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,	)	
Plaintiffs,	)	No. 93 C 5860
v.	)	Judge Shadur
CITY OF NORTHLAKE, MAYOR REID PAXSON and POLICE CHIEF SEYMOUR SAPZONIK,	)	Magistrate Judge Gottschall
Defendants.	)	

12(b)(6) MOTION TO DISMISS

NOW COME the defendants, CITY OF NORTHLAKE, REID PAXSON and SEYMOUR SAPOZNIK, by and through their attorneys, FRATERRIGO, BEST & BERANEK, and respectfully request dismissal with prejudice of plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In support thereof, defendants state as follows:

1. Plaintiffs allege a First Amendment claim in count I and a due process claim in count II arising from termination of plaintiffs' towing services by the CITY OF

NORTHLAKE. Plaintiffs allege termination of towing services was in retaliation for plaintiffs' refusal to contribute to MAYOR REID PAXSON's re-election campaign.

2. A nearly identical theory of recovery was rejected in Downtown Auto Parks, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir. 1991). In that case, plaintiff alleged First Amendment and due process violations as a result of the City of Milwaukee refusing to extend its leases to operate City parking lots. Plaintiff claimed the City's refusal to extend leases was in retaliation for plaintiffs' lobbying efforts against legislation proposed by the City of Milwaukee.

3. With respect to plaintiff's First Amendment claim, the court stated simply that First Amendment protection does not extend to independent contractors whose bids for public contracts are rejected on the basis of political views.

4. With respect to the due process claim asserted, the Seventh Circuit noted that the threshold requirement is a claim for deprivation of liberty or property. In order to have a property interest, there must be more than a unilateral expectation of it. There must be a legitimate claim of entitlement to it. Property interests are created and their dimen-

sions are defined by existing rules or understandings that stem from an independent source, such as state law. Downtown Auto Parks had a unilateral expectation of renewal of the leases. This was because the City had discretion to award the leases to others. Similarly, the Complaint acknowledges that NORTHLAKE had discretion to award towing contracts to other contractors, by reason of the list of contractors mentioned in the Complaint.

5. The result in Downtown Auto Parks, requires dismissal of plaintiffs' cause of action here.

6. To the extent the Complaint seeks preliminary and permanent injunctive relief, even if the Motion to Dismiss is denied, plaintiffs are still not entitled to injunctive relief. There is no showing that plaintiffs have no adequate remedy at law, that plaintiffs will suffer irreparable injury and of any likelihood of succeeding on the merits. See: Roland Machinery Company v. Dresser Industries, Inc., 749 F.2d 380 (7th Cir. 1984). In fact, if plaintiffs are able to state a cause of action, money damages is clearly an appropriate remedy. There is no irreparable injury, since money damages can redress any injury plaintiffs are able to prove and finally, based

on Downtown Auto Parks, Inc., Supra., it appears unlikely that plaintiffs can succeed on the merits.

WHEREFORE, defendants respectfully request pursuant to Federal Rule of Civil Procedure 12(b)(6), that plaintiffs' Complaint be dismissed with prejudice.

FRATERRIGO, BEST & BERANEK

By:_____
Attorneys for defendants

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(312)782-9255

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss was mailed to all counsel of record herein this 3rd day of December, 1993.

_____
Attorney

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,	)	
	)	No. 93 C 5860
Plaintiffs,	)	
	)	Judge Shadur
v.	)	
	)	Magistrate Judge Gottschall
CITY OF NORTHLAKE, MAYOR REID PAXSON and POLICE CHIEF SEYMOUR SAPZONIK,	)	
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT

NOW COME the defendants, REID PAXSON and SEYMOUR SAPOZNIK, by and through their attorneys, FRATERRIGO, BEST & BERANEK, and respectfully request this Honorable Court pursuant to Federal Rule of Civil Procedure 56 for the entry of an Order of summary judgment in their favor. In support thereof, defendants state as follows:

1. Defendants, PAXSON and SAPOZNIK, seek summary judgment based on the Doctrine of Qualified Immunity.

2. Under the Doctrine of Qualified Immunity, "public officials performing discretionary functions are protected against suits from damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." Doe v. Bobbitt, 881 F.2d 510, 511 (7th Cir. 1989) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

3. To determine whether the right allegedly violated was "clearly established" the right must be identified in a particularized sense with respect to the circumstances of the alleged violation. Warlick v. Cross, 969 F.2d 303, 309 (7th Cir. 1992).

4. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Anderson v. Creighton, 483 U.S. 635 (1987).

5. Plaintiff has the burden of showing that the constitutional right was clearly established. Rice v. Burks, 999 F.2d 1172, 1173 (7th Cir. 1993) (citing Rakovich v. Wade, 850 F.2d 1180 (7th Cir.), cert denied 488 U.S. 968 (1988)).

6. At the times alleged in plaintiffs' Complaint

the state of First Amendment and Fourteenth Amendment law is as set forth in Downtown Auto Parks, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir. 1991). This case established that an independent contractor did not have First Amendment Claim against a municipality when the municipality terminates a prior business relationship. The case also reiterates that in order to state a due process claim, there must more than a unilateral expectation of a benefit, there must be a legitimate claim of entitlement.

7. At the time defendants are alleged to have terminated plaintiffs' relationship with the CITY OF NORTHLAKE, there is no precedent to suggest doing so could affect plaintiffs' First Amendment rights. As set forth above, an independent contractor has no First Amendment claim against a municipality when services are terminated.

8. With respect to plaintiffs' due process claim, established case law is that plaintiffs must show more than a unilateral expectation of a benefit. However, the decision whether or not to use plaintiffs' towing services was entirely discretionary, per the allegations of the Complaint. As such, plaintiffs had no legitimate claim of entitlement to continue

business relations with the CITY OF NORTHLAKE and therefore, no due process claim.

9. Consequently, in the event plaintiffs' First Amendment or due process claim is recognized in this case, it would mark a departure from established case law. Defendants, PAXSON and SAPOZNIK, are not required to anticipate changes in case law; instead, plaintiffs must demonstrate that their actions violated a clearly established constitutional right. This plaintiffs cannot do. Therefore, defendants are entitled to summary judgment based on the Qualified Immunity Doctrine.

WHEREFORE, defendants, REID PAXSON and SEYMOUR SAPOZNIK, respectfully request this Honorable Court for the entry of an Order of summary judgment in their favor and against plaintiffs.

FRATERRIGO, BEST & BERANEK

By:_____
Attorneys for defendants

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss was mailed to all counsel of record herein this 3rd day of December, 1993.

_____

Attorney

Supreme Court, U.S.
FILED
JAN 18 1996
CLERK

No. 95-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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52 pp

QUESTION PRESENTED

Whether the City violated the First Amendment by terminating business with an independent contractor solely because the contractor exercised his constitutionally protected right of political belief and association by supporting the incumbent mayor's political opponent for election?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 2

THE CONSTITUTIONAL PROVISIONS AT ISSUE 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. INDEPENDENT CONTRACTORS' POLITICAL ASSOCIATIONS ARE PROTECTED BY THE FIRST AMENDMENT. 9

A. Petitioners' Political Association With Paxson's Opponent and Refusal to Associate Politically With Paxson are Protected 11

B. Petitioners' Political Speech is Protected 15

1. Petitioners were sanctioned under a practice of viewpoint suppression 15

2. Petitioners were sanctioned under a practice of forced speech 17

C. Petitioners' Refusal To Make Campaign Contributions To A Candidate He Opposes Is Protected 19

D. A Blanket Ban On The First Amendment Rights Of Government Contractors Cannot Be Squared With This Court's Precedents 21

II. THE COURT OF APPEALS FAILED TO CONSIDER THE PENALTY ON PETITIONERS' RIGHTS AND THE CITY'S INTEREST IN PATRONAGE 21

III. GOVERNMENT INTEREST IN PATRONAGE DO NOT JUSTIFY THE DENIAL OF FIRST AMENDMENT RIGHTS TO ALL WHO DO BUSINESS WITH GOVERNMENT 32

A. Effective And Efficient Government 33

B. The Need For Politically Loyal Employees 35

C. Preserving The Democratic Process 37

CONCLUSION 41

TABLE OF AUTHORITIES

PAGE

Cases:

Abercrombie v. City of Catoosa, 896 F.2d 1228 (10th Cir. 1990) 10

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 10, 13, 20, 22

Anderson v. Celebrezze, 460 U.S. 780 (1983) 40

Baggett v. Bullitt, 377 U.S. 360 (1964) 16

Baird v. State Bar of Arizona, 401 U.S. 1 (1971) 22

Blackburn v. City of Marshall, 42 F.3d 925 (5th Cir. 1995) 24

Branti v. Finkel, 445 U.S. 507 (1980) 7, 36

Brown v.Trench,787 F.2d 167 (3d Cir. 1986) 36

Buckley v. Valeo, 424 U.S. 1 (1976) 6, 11, 18, 20, 23

Chicago Teachers Union, Local No.1, AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986) 29-30

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal., 454 U.S. 290 (1981) 11

City of Ladue v. Gilleo, __ U.S. __, 114 S.Ct. 2038 (1994) 15

Copsey v. Swearingen, 36 F.3d 1336 (5th Cir. 1994) 24

Cousins v. Wigoda, 419 U.S. 477 (1975) 11

Dolan v. City of Tigard, ___ U.S. __, 114 S. Ct. 2309 (1994) 14

Downtown Auto Parks, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir.), *cert denied* 502 U.S. 1005 (1991) 5, 25

Elrod v. Burns, 427 U.S. 347 (1976) 6, 8, 9, 12, 13, 14, 16, 20, 26, 27, 28, 30, 33, 35, 36

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 19, 21

Fox & Co. v. Schoemehl, 671 F.2d 303 (8th Cir. 1982) 26

Havekost v. United States Dept. of Navy, 925 F.2d 316 (9th Cir. 1991) 24

Horn v. Kean, 796 F.2d 668 (3rd Cir. 1986) 28

Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 11, 12, 40

Keller v. State Bar of California, 496 U.S. 1 (1990) 10, 13, 20

Keyishian v. Board. of Regents of State of N.Y., 385 U.S. 589 (1967) 16

Kusper v. Pontikes, 414 U.S. 51 (1973) 11

LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983), *cert denied*, 464 U.S. 1044 (1984) 5-6, 25, 26

Lefkowitz v. Turley, 414 U.S. 70 (1973) 31

McDaniel v. Paty, 435 U.S. 618 (1978) 22

McIntyre v. Ohio Elections Com'n, __U.S.__, 115 S.Ct. 1511 (1995) 10, 14, 18

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 17

Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943) 29

NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449 (1958) 11

Ness v. Marshall, 660 F.2d 517 (3d Cir. 1981) 36

Norman v. Reed, 502 U.S. 279 (1992) 9, 13, 40

North Mississippi Communication, Inc. v. Jones, 792 F.2d 1330 (5th Cir. 1986) 24

O'Hare Truck Service, Inc. v. City of Northlake, 47 F.3d 883 (7th Cir. 1995) 2, 22

O'Hare Truck Service, Inc. v. City of Northlake, 843 F.Supp. 1231 (N.D. Ill. 1994) 2

Pell v. Procunier, 417 U.S. 817 (1974) 22

Perry Ed. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983) 16

Perry v. Sindermann, 408 U.S. 593 (1972) 6, 9, 14, 23, 33

Pickering v. Bd. of Educ. of Tp. High School Dist. 205, Will County, Illinois, 391 U.S. 563 (1968) 22

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992) 15

Riley v. National Federation of the Blind of N.C. Inc., 487 U.S. 781 (1988) 17

Rosenberger v. Rector & Visitors of the University of Virginia, __ U.S. __, 115 S. Ct 2510 (1995) 14, 15-16, 17, 20

Roth v. United States, 354 U.S. 476 (1957) 18

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 5, 14, 30, 32, 33, 36, 37, 40

Shelton v. Tucker, 364 U.S. 479 (1960) 11

Simon & Schuster Inc. v. Members of New York State Victims Bd., 502 U.S. 105 (1991) 15, 22

Smith v. Cleburne County Hospital, 870 F.2d 1375 (8th Cir. 1989) 24

Speiser v. Randall, 357 U.S. 513 (1958) 15, 16

Sweeney v. Bond, 669 F.2d 542 (8th Cir. 1982) 23

Sweezy v. State of New Hampshire,
354 U.S. 234 (1957) 10

Tinker v. Des Moines Indep. Community Sch. Dist.,
393 U.S. 503 (1969) 22

Triad Associates, Inc. v. Chicago Housing Authority,
892 F.2d 583 (7th Cir. 1989) 25

Umbehr v. McClure, 44 F.3d 876 (10th Cir. 1995)
(No. 94-1654, argued November 28, 1995,
*sub nom. Board of Commissioners, Wabaunsee
County, Kansas v. Umbehr*) 23-24

Waters v.Churchill, __ U.S. __, 114 S. Ct. 1878
(1994) 7, 22

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 16, 17

Wooley v. Maynard, 430 U.S. 705 (1977) 17

Constitutional and Statutory Provisions

U.S. Const. amend. I 3

U.S. Const. amend. XIV § 1 3

18 U.S.C. § 287 34

18 U.S.C. § 874 34

18 U.S.C. § 1001 34

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. §§ 1331 and 1343 2

28 U.S.C. § 2514 34

31 U.S.C. § 3730 34

65 ILCS 5/3.1-25-35 38

65 ILCS 5/3.1-25-50 38

65 ILCS 5/4-3-10 38

65 ILCS 5/4-3-16 38

625 ILCS 5/4-200 *et seq.* 34

625 ILCS 5/4-202-203 ..... 5, 34

625 ILCS 5/5-202(a)(b) 34

625 ILCS 5/12-606 34

735 ILCS 5/20-101*et seq.* 35

Act of July 7, 1995, P.A. 89-95 (Illinois) 38

Other Authorities

M. Tolchin and S. Tolchin, *To the Victor* (1971) 10, 39

No. 95-191

In The

Supreme Court of the United States

October Term, 1995

O'HARE TRUCK SERVICE, INC.
and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON,
and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *O'Hare Truck Service, Inc. v. City of Northlake*, 47 F.3d 883 (7th Cir. 1995). It is reprinted in the appendix to the petition for writ of certiorari in this case at page 2a (hereinafter "P.A. __"). The opinion of the United States District Court for the Northern District of Illinois is reported as *O'Hare Truck Service, Inc. v. City of Northlake*, 843 F.Supp. 1231 (N.D. Ill. 1994), and is reprinted at P.A. 10a.[1]

JURISDICTIONAL STATEMENT

Original jurisdiction in the United States District Court was based upon 28 U.S.C. §§ 1331 and 1343. Petitioners appealed the District Court's dismissal of this case to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291. On February 10, 1995, the Court of Appeals affirmed the District Court's decision. Rehearing by the Court of Appeals was denied on March 3, 1995. P.A. 1a.

This Court's jurisdiction was invoked under 28 U.S.C. § 1254(1) in a Petition filed July 31, 1995. On December 8, 1995, this Court granted the Petition.

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[1] The opinions involved are reprinted in the Appendix to the Petition for a Writ of Certiorari in Case No. 95-191. Citations to this Appendix are made to the page number therein as "P.A. ___a." Citations to the Appendix in Respondents' Brief in Opposition are made as "R.A. ___a." Citations to the Joint Appendix are made to the page number therein as J.A. ___."

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

For nearly three decades, beginning in 1965 and continuing until July of 1993, Petitioners O'Hare Truck Service, Inc. ("O'Hare") and John Gratzianna provided towing services to Respondent City of Northlake, Illinois ("City"). First Amended Complaint at ¶¶ 9, 14, P.A. 22a, 23a. O'Hare provided the City with towing services under various circumstances, including accidents, mechanical breakdowns, and the abandonment of vehicles. ¶¶ 5,7, P.A. 21a, 22a. When the

City needed a vehicle towed, it would request service from a company on a list which was maintained by the City police department. It was the practice of the City to distribute its towing work among these companies -- including O'Hare -- by selecting them in turn. ¶ 7, P.A. 22a. During this entire period, O'Hare performed these services in a professional and competent manner. ¶ 21, P.A. 24a.

In 1993, Respondent Reid Paxson ran for reelection as mayor. ¶ 11, P.A. 22a. Mr. Gratzianna was asked by Paxson's campaign committee to contribute to Paxson's reelection campaign. ¶ 12, P.A. 22-23a. Mr. Gratzianna refused to do so and instead openly supported Paxson's opponent, including placing campaign posters at O'Hare's place of business in Northlake. ¶ 13, P.A. 23a.

Because Mr. Gratzianna refused to contribute to Paxson's campaign and instead supported the mayor's opponent, in July 1993, the City removed O'Hare from its list of towing companies and stopped doing business with Petitioners. ¶¶ 14, 16, 17, P.A. 23a. As a consequence, Petitioners lost a substantial amount of income. ¶ 15, P.A. 23a.

On September 24, 1993, Petitioners filed this action, alleging that Respondents, Mayor Paxson, Police Chief Sapoznik, and the City of Northlake, had violated their First and Fourteenth Amendment rights of political association, speech and due process by ceasing to do business with O'Hare because of Mr. Gratzianna's refusal to contribute financially to Mayor Paxson's campaign and his support for the mayor's opponent during the last election.

Respondents moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). The District Court indicated in a preliminary order that it was inclined to grant dismissal based on the Seventh Circuit's holding in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005 (1991), which rejected any First Amendment protection (whether for speech or political association) for independent contractors. Pursuant to the preliminary order, the Petitioners simultaneously submitted a First Amended Complaint and a memorandum of law opposing dismissal, arguing that *Downtown Auto Parks* conflicted with pertinent Supreme Court precedents. The District Court subsequently dismissed the First Amended Complaint with prejudice.

On appeal, Petitioners asked the Seventh Circuit to reconsider its broad denial of First Amendment rights to independent contractors in light of the principles enunciated in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), and others of this Court's cases. The Seventh Circuit noted that it already had considered the impact of *Rutan* in *Downtown Auto Parks*, however, and refused to revisit the issue. Although the court had acknowledged in *Downtown Auto Parks* that "the scope of *Rutan*, and rationale behind it, seem to be at odds with the holding of" earlier Seventh Circuit decisions rejecting contractors' political association rights as the basis for a claim, the court nevertheless clung to the reasoning of its seminal case in the area of contract patronage, *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. de-*

nied, 416 U.S. 1044 (1984). The court concluded that "it should be up to the Supreme Court to extend *Elrod* [*v. Burns*, 427 U.S. 347 (1976)]." *O'Hare*, P.A. 5a. Relying on *LaFalce* and subsequent cases, the Seventh Circuit rejected Petitioners' First Amendment claim and affirmed the dismissal. This Court granted certiorari on December 8, 1995.

SUMMARY OF ARGUMENT

This Court consistently has given paramount protection to the core First Amendment rights of political speech and association. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). No reason of law or policy justifies the blanket ban that the Seventh Circuit has imposed on the exercise of these rights by independent contractors. An individual who agrees to perform services for or at the request of government does not forfeit these rights. Nor may the government condition the receipt or retention of government benefits on the waiver of rights of speech and association. *See Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

Any abridgement of these fundamental First Amendment freedoms is subject to the most exacting scrutiny of constitutional review. The burden is on government to establish that compelling interests justify its actions and that it has chosen means least restrictive of rights of association and speech. *Buckley v. Valeo*, 424 U.S. at 25, 45-46.

Government's interest in the conduct of its independent contractors is limited to ensuring that the services are properly and efficiently performed. Government generally lacks

a sufficiently compelling reason to restrict the political affiliation of such persons. Interests generally asserted in support of patronage practices do not justify terminating municipal business with an independent contractor because of a refusal to affiliate with an incumbent mayor during reelection. These interests serve no governmental purpose, except in the limited circumstances where the contractor performs services for which political loyalty to the mayor would be "an appropriate requirement for the effective performance" of the services. *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Petitioner towing company does not perform services requiring such political affiliation.

Similarly, the related political speech of a contractor should not be penalized in the absence of compelling justification, such as disruption of the operational efficiency of government. If, as in this case, the contractor performs its duties outside the government workplace, is not supervised by the government employer, cannot be said to speak for the government, and does not perform the duties of a high-level office, there is no justification for restraints on political speech. *See Waters v. Churchill*, __ U.S. __, 114 S. Ct. 1878 (1994).

The decision of the Court of Appeals conformed to no established standard of constitutional review or analysis. Under that court's precedents banning all rights of political association and speech for government contractors, Respondents were not required to and did not offer any justification for their actions. Distinguishing public employees whose rights of political association have been protected by this Court

from political discharge, the court below determined that the Petitioners were not as dependent on government as are employees, and were therefore less likely to be vulnerable to forced political affiliation. The court then gave deference to the perpetuation of the institution of patronage, without examining government's interest in retaliating against contractors for their political associations. For these reasons, the Court of Appeals concluded that Petitioners were without legal recourse though they actually had been penalized for their refusal to associate and to make campaign contributions contrary to their beliefs. *Cf. Elrod v. Burns*, 427 U.S. 347, 359 (1976) (dismissal for failure to support party "penalizes" the exercise of associational rights). The court's analytical framework failed to measure any of the interests required by any test under this Court's First Amendment jurisprudence.

In summary, no constitutional basis exists for creating a categorical exception to freedom of political association and speech for independent contractors. This Court should reverse the decision of the Court of Appeals and remand the case to the District Court.

ARGUMENT

I. INDEPENDENT CONTRACTORS' POLITICAL ASSOCIATIONS ARE PROTECTED BY THE FIRST AMENDMENT.

This case involves a municipality's retaliation for a contractor's protected political activities.[2] Below, Petitioners separately review each component of Petitioners' activities which formed the basis for Respondents' retaliatory termination of O'Hare's business relationship. Each component -- candidate affiliation, campaign speech, and financial contribution -- is a part of the nucleus of free speech and associational interests that form the heart of the First Amendment.

These same core First Amendment freedoms were the foundation for this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976). In the twenty years since *Elrod*, this Court has protected vigorously First Amendment rights of political speech and association in a myriad of different contexts, including ballot access rules, *Norman v. Reed*, 502 U.S. 279 (1992) (new party's disqualification from ballot under rules regarding use of party names and signature requirement is

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[2] Though O'Hare does not have a formal contract with the City, both the District Court and the Seventh Circuit treated O'Hare's claims as those of an independent contractor, as apparently they would any non-employee of government. The lack of a contract is not legally significant to the Court's First Amendment analysis. *Perry v. Sindermann*, 408 U.S. 593 (1972). For ease of reference, Petitioners generally have referred to O'Hare as an independent contractor. Respondents have done the same. *See, e.g.*, Respondents' Brief in Opposition at 5-9; Defendants' 12(b)(6) Motion to Dismiss, J.A. 23, ¶¶ 3, 4.

unconstitutional); referendum leafletting, *McIntyre v. Ohio Elections Comm'n*, __U.S.__, 115 S.Ct. 1511 (1995) (state may not constitutionally require campaign leaflets to bear name and address of publisher); and union and bar association dues, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (teachers' union may not constitutionally include funds for political causes in dues assessment); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (same for members of bar).

Each of Petitioners' political activities is protected under this Court's extensive First Amendment jurisprudence. This constitutional protection is not vitiated by the invocation of the label "political patronage." Even if there is a patronage aspect to this case -- the City's discretionary dispensation of benefits to Mayor Paxson's political supporters and its withdrawal from his opponents -- the City's interest in that patronage practice must be subject to constitutional scrutiny.[3]

The First Amendment principles that formed the basis of this Court's decision in *Elrod* remain as vibrant today as they were the day *Elrod* was decided. They should be applied to this case with the same vigor that this Court always has used in analyzing restraints on core First Amendment activity.

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[3] Patronage may be broadly defined as "the allocation of the discretionary favors of government in exchange for political support." M. Tolchin and S. Tolchin, *To The Victor* 5 (1971). The courts below tacitly treated the City's policy of political retaliation as being a patronage practice.

A. Petitioners' Political Association With Paxson's Opponent and Refusal to Associate Politically With Paxson are Protected.

This Court long has recognized that the ability of individuals to come together for collective political action is at the core of the First Amendment. "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality).

Political associational behavior frequently is intertwined with the exercise of many other forms of expression, such as freedom of speech, the right to petition for redress, and voting for the candidate of one's choice. Without protection for associational rights, these other civil liberties would be imperiled. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290, 294 (1981); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

This Court's frequent decisions protecting associational activities recognize the right of political association as "fundamental." *E.g. Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (political beliefs and voting); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam) (campaign contributions and expenditures). *See also Cousins v. Wigoda*, 419 U.S. 477, 482-83 (1975) (right of party to control delegate selection). The right to associate with a political party is an "integral part" of the freedom of association. *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

The elevated level of constitutional protection provided to the right of political association was a key aspect of the Court's analysis in *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality). That case was initiated by Republican employees of the Cook County Sheriff's Department shortly after the election of a Democratic sheriff who threatened to terminate employees refusing to affiliate with the Democratic Party. This Court described the toll that patronage takes on First Amendment freedoms. Employees must work for party policies in which they do not believe, and against policies they support. In addition, they are forced to make financial contributions that are "tantamount to coerced belief." *Id.* at 355. To retain their jobs, the *Elrod* workers were required to "pledge their political allegiance to the Democratic Party." *Id.* at 355. "The threat of dismissal for failure to provide ... support unquestionably inhibits protected belief and association, and dismissal for failure to support only penalizes its exercise." *Id.* at 359. The pressure to affiliate with the party in power constrained the ability of employees to associate with others of like political persuasion, thus directly abridging their freedom of political association. *Id.* at 355-57. The interests proffered by the Sheriff were not sufficiently compelling to justify this broad restraint. *Id.* at 369-73.

Since *Elrod*, this Court has continued to afford the strongest protection to the right of political association. For example, in *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), a rule required new parties to obtain more signatures in order to be on a local election ballot than would have been required to be on the ballot in a statewide election. Employing strict scrutiny, this Court invalidated the rule on both political association and equal protection grounds. *See also Norman v. Reed*, 502 U.S. 279 (1992).

The right to associate and freedom from compelled association are two sides of the same coin. One clearly presupposes the other, and both are entitled to the same high degree of protection. *See Keller v. State Bar of California*, 496 U.S. 1, 10; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35. It does not matter whether Petitioners were terminated for their refusal to affiliate with Respondent Paxson's candidacy, or because they chose to affiliate with Paxson's opponent. In either event, the termination of the relationship was nothing more than punishment for Mr. Gratzianna's and O'Hare's decision to act on their political convictions by exercising the freedom of political association. *Elrod*, 427 U.S. at 359.

John Gratzianna's political activities, as described in the First Amended Complaint, are the essence of political association, and formed the basis for the City's decision to terminate its business relationship with O'Hare. Mr. Gratzianna "openly supported" Paxson's political opponent, including the display of campaign posters at O'Hare's place of business, and he declined affiliation with Paxson by "refusing to contribute to Paxson's campaign" despite being solicited to do so. P.A. 22a-23a, ¶¶ 12-13. The penalty assessed by Respondents for Petitioners' associational decisions -- termination of business with the City of Northlake -- was a significant

one, for it caused Petitioners substantial loss of income. P.A. 23a, ¶ 15. *Compare McIntyre v. Ohio Elections Comm'n*, __ U.S. __, 115 S.Ct. 1511 (1995) (civil penalty of $100).

The fact that the City had no continuing legal obligation to maintain O'Hare on the rotation list is irrelevant and does not mitigate the penalty imposed by the City for Mr. Gratzianna's political support of Mayor Paxson's opponent. To the contrary, by conditioning O'Hare's ability to remain on the list on its owner's political affiliation with Paxson, the City directly violated this Court's "unconstitutional conditions" doctrine. It is "well-settled" that government may not deny a benefit to an individual for a reason that infringes on that individual's protected constitutional interests. *Dolan v. City of Tigard*, ___ U.S. __, 114 S. Ct. 2309, 2317 (1994), (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). *See Rutan*, 497 U.S. at 72; *Elrod*, 427 U.S. at 359 (*Perry* "broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a government benefit."). *See also Rosenberger v. Rector & Visitors of the University of Virginia*, __ U.S. __, 115 S. Ct. 2510 (conditioning receipt of student activity fees on viewpoint).

In short, Petitioners were presented with a classic Hobson's choice. To maintain a relationship with the City, Petitioners were required to submit to an unconstitutional condition. Because they refused to do so, they suffered a severe economic penalty.

B. Petitioners' Political Speech is Protected.

1. Petitioners were sanctioned under a practice of viewpoint suppression.

Mr. Gratzianna displayed campaign posters at his place of business as a way of openly demonstrating support for his preferred candidate. Such a display on one's own private property is a time-honored form of political speech. Like a residential sign, a campaign poster is an "unusually cheap and convenient form of communication." *City of Ladue v. Gilleo*, __ U.S. __, 114 S.Ct. 2038, 2046 (1994). Posters and yard signs promoting one's candidate are routinely displayed on supporters' private property during election campaigns.

Petitioners were sanctioned because their sign endorsed Paxson's opponent; thus, the penalty was based on viewpoint. The effect of Respondents' actions is "to penalize [Petitioners] for such speech. Its deterrent effect is the same as if the [government] were to fine them for this speech." *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

This Court's most recent free speech cases resoundingly denounce systems of viewpoint suppression. For example, while regulations imposing a burden on the basis of content are "presumptively unconstitutional," *Simon & Schuster, Inc. v. Members of New York State Victims Bd.*, 502 U.S. 105, 108 (1991), "the violation of the First Amendment is all the more blatant" when speech is targeted because of the speaker's views. *Rosenberger v. Rector & Visitors*, __ U.S. __, 115 S. Ct. 2510, 2516 (1995) (citing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992)). "The government must abstain

from regulating speech when the specific motivating ideology or the opinion or the perspective of the speaker is the rationale for the restriction." *Rosenberger*, 115 S. Ct. at 2516 (citing *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)). This Court's condemnation of systems of viewpoint suppression could not be more forceful.

The City of Northlake's conduct embodies the essence of viewpoint suppression. Government benefits are bestowed on those who express support for the incumbent mayor, while those who express the contrary view have those benefits unilaterally withdrawn. In penalizing O'Hare for its owner's political speech and association, the City of Northlake has done precisely what this Court consistently has held the First Amendment to forbid. Like the university in *Rosenberger* that facilitated student speech except if it was religious, and like the state in *Speiser v. Randall* that conditioned property tax exemptions on a loyalty oath, the City extracts conformance to its orthodoxy by conditioning Petitioners' contract on expressed loyalty to Mayor Paxson.

In *Elrod*, the plurality noted that a system of punishment for refusal to embrace government-approved positions can result in a government-enforced orthodoxy of views. 427 U.S. at 356 (relying upon *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). *See also Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (termination of teaching contract for refusal to sign loyalty oath); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (same); *Speiser v. Randall*, 357 U.S. 513 (denial of property tax exemption for refusal to sign loyalty

oath). *Cf. Rosenberger*, 115 S. Ct. at 2524 (cautioning that government review of student writings for religious content risks requirement that writings must "meet some baseline standard of secular orthodoxy"). Such an enforced orthodoxy is the anticipated result of the City's practice here; all individuals and companies who wish a business relationship with the City must demonstrate political support of the mayor's re-election bid.

2. Petitioners were sanctioned under a practice of forced speech.

One of the vices of the political patronage practice held unconstitutional in *Elrod* was that it forced workers, on penalty of termination, to work for causes that they did not personally embrace. A long line of this Court's cases teaches that government cannot compel individuals to espouse causes in which they do not believe. *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781, 790-791 (1988); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Wooley v. Maynard*, the Court explained the complementary nature of the right to speak and the right to refrain from speaking. "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." 430 U.S. at 714.

Just last term, in *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, this Court struck a state statute requiring that campaign literature contain the name and address of persons publishing the literature. Rejecting arguments that the law should be analyzed under the less stringent tests used in cases governing the "mechanics of the voting process," *id.* at 1518, this Court analyzed the regulation under traditional First Amendment standards, applying strict scrutiny to this abridgment of "core political speech." *Id.* at 1519. Just as the state could not compel the newspaper in *Tornillo* to print replies by candidates it had criticized, the state could not compel the leaflet's author to identify herself. *See Id.* at 1520.

Like the leaflets aimed at defeat of a proposed tax levy in *McIntyre*, Mr. Gratzianna's posters and public candidate support, as campaign speech by an interested voter, "occup[y] the core of the protection afforded by the First Amendment." *McIntyre*, 115 S. Ct. at 1518. "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* at 1518-19 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957) and *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976)). Finally, as in *McIntyre*, Mr. Gratzianna's advocacy took place in the course of the electoral process, thereby strengthening the First Amendment protection afforded it. *Id.*

While Mrs. McIntyre was subject to a civil penalty of $100 for her anonymous leaflets, Respondents exacted a far greater penalty from Petitioners for displaying campaign posters:

withdrawal of city business. If anything, the system at work in this case is more offensive to constitutional values than the one at work in *McIntyre*: unlike that forced speech required by statute, this one is viewpoint-based, unwritten, and imposed at the will of the City's executive.

C. Petitioners' Refusal To Make Campaign Contributions To A Candidate They Oppose Is Protected.

Petitioners' choice of whether to support a political candidate with a financial contribution, and which candidate to support, also enjoys the highest level of constitutional protection. Limitations on political contributions and expenditures directly implicate fundamental First Amendment interests. *Buckley v. Valeo*, 424 U.S. at 23. In addition to serving as a general expression of support for a candidate or issue, "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22. Political spending is "at the heart of the First Amendment's protection," *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Thus, restrictions on such spending or retaliation for political contributions operate as "a prohibition directed at speech itself." *Id.* at 786.

The *Elrod* plurality also singled out forced contributions for special criticism. "The financial and campaign assistance that [an employee] is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and

any assessment of his salary is tantamount to coerced belief." *Elrod*, 426 U.S. at 355 (citing *Buckley v. Valeo*, 424 U.S. at 19). This Court has continued, since *Elrod*, to actively guard against government-imposed systems of forced financial contributions for political causes.

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), involved a challenge to a requirement that public employees pay union dues that included union expenditures for political causes. The Court's analysis was based on the same principles that formed its holding in *Elrod*. Because public employment cannot be conditioned on a waiver of constitutional rights and because compelling financial support for ideology coerces belief, the inclusion of funds for political causes in the dues assessment contravened the First Amendment. "For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than being coerced by the State." *Abood*, 431 U.S. at 234-35 (citing *Elrod*, 427 U.S. at 356-57).

That coercive financing of political causes abridges First Amendment freedoms has continuing vitality in this Court's jurisprudence. In *Keller v. State Bar of California*, 496 U.S. 1 (1990), Chief Justice Rehnquist, writing for a unanimous Court, relied on *Abood* to strike a system of forced payments to a bar association to finance political and ideological activities. *Id.* at 9-11. *See also Rosenberger v. Rector & Visitors*, __ U.S. __, 115 S. Ct. 2510, 2527 (1995) (O'Connor, J., concurring) (noting that the student fee at issue in that case

would be susceptible to challenge under *Keller* and *Abood* if students were compelled to support speech with which they disagreed).

The City invoked government power to require a contribution to Paxon's political campaign as an implicit, but essential, condition of remaining on the rotation list. The tacit conditioning of a benefit on the waiver of First Amendment rights is no different from the termination of employment for speech and associational activities condemned in *Perry*. When the Petitioners refused to contribute, the City penalized that refusal with its most potent sanction: termination of City business. Just as surely as the First Amendment was violated by the forced contribution systems in *Elrod*, *Abood* and *Keller*, it is violated here.

D. A Blanket Ban On The First Amendment Rights Of Government Contractors Cannot Be Squared With This Court's Precedents.

The Seventh Circuit's categorical denial of First Amendment protection to contractors as a class, P.A. 5a, cannot be reconciled with the case law discussed above. This Court has consistently rejected the notion that certain classes of speakers are simply outside the First Amendment. As the Court has pointed out, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). "The Government's power to impose content-based financial disincentives on speech

surely does not vary with the identity of the speaker." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, __U.S.__, 112 S.Ct. 501, 509 (1991). Similarly, efforts by government bodies to burden fundamental First Amendment rights because of a person's occupation have been firmly rejected. *See Simon & Schuster, Inc.*, 112 S.Ct. 501 (convicted authors); *McDaniel v. Paty*, 435 U.S. 618 (1978)(clergy); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)(non-union workers); *Pell v. Procunier*, 417 U.S. 817 (1974)(prisoners); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971)(attorneys); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)(students); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)(teachers).

It is one thing to say that government has certain interests in its business relationship which must be considered in any First Amendment analysis. *Cf. Waters v. Churchill*, __ U.S. __, 114 S. Ct. 1878 (1994). It is quite another thing to say that no assessment of interests is required because private businesses forfeit all First Amendment rights when they enter into business relationships with the government. *O'Hare*, 47 F.3d at 885, P.A. 5a. None of the decisions of this Court warrant denial of *all* protection of core political speech and association to *all* businesses who perform services for government.

For example, there are no grounds to assume that all contractors pose a threat to the government's interest in preserving the integrity of supervisory relationships or in avoiding work-place disruption. *See Pickering v. Bd. of Educ.*, 391

U.S. 563 (1968). Neither is there any basis to assume that all entities which do government business necessarily perform duties in which party affiliation, or in this case, candidate affiliation with the mayor, is "an appropriate requirement for . . . effective performance", *Branti*, 445 U.S. at 518. In any event, the City would bear the burden of justifying such restraints. *Buckley v. Valeo*, 424 U.S. 1, 24, 45-46 (1976).

In contrast to the categorical denial of rights by the Seventh Circuit, the Court of Appeals for the Tenth Circuit has held that non-employees are entitled to First Amendment protection from retaliation based on political associations. *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990), also involved a towing contractor removed from a rotation list in retaliation for supporting a challenger to the incumbent mayor. In *Abercrombie*, 896 F.2d at 1233, the Tenth Circuit correctly applied this Court's general unconstitutional conditions law to the First Amendment retaliation claim, relying on *Perry v. Sinderman*, 408 U.S. 593 (1973).[4]

Though not directly addressing the issue of political association, many federal circuit courts have held that independent contractors and other non-employees are protected by the First Amendment from retaliation based on speech, including criticism of government officials. In conformity with its decision in *Abercrombie*, the Tenth Circuit held in *Umbehr*

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[4] In contrast to *Abercrombie*, the Third and Eighth Circuits, in addition to the Seventh Circuit, have held that political associational rights of independent contractors are not protected. *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986), *Fox & Co. v. Schoemehl*, 671 F.2d 303(8th Cir. 1982), *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982).

v. McClure, 44 F.3d 876 (10th Cir. 1995) (No. 94-1654, argued November 28, 1995 *sub nom. Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*), that a government contractor's speech, including public criticism of the governmental officials controlling the contract, was entitled to First Amendment protection. *See also Blackburn v. City of Marshall*, 42 F.3d 925, 934 (5th Cir. 1995) (tow truck operator terminated from rotation list for criticism of bidding method); *Copsey v. Swearingen*, 36 F.3d 1336, 1346 (5th Cir. 1994) (concession stand contractor terminated for criticizing administration of vending program); *North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330 (5th Cir. 1986) (termination of placement of legal advertising in newspaper in retaliation for critical editorials); *Havekost v. United States Dept. of Navy*, 925 F.2d 316 (9th Cir. 1991) (licensee working in Navy commissary may state claim for retaliatory termination); *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989) (independent contractor physician entitled to protection for speech on matters of public concern).

While employing varying standards of either *Perry* or *Pickering*, these decisions properly conclude that the retaliatory action against non-employees in the form of denial of business benefits because of the exercise of speech is actionable. It would be a bitter anomaly if the Constitution protected contractors from being terminated for publicly criticizing a public official, but allowed government to cut off its business when the contractors refused to contribute to the reelection of the same official.

The Seventh Circuit's categorical denial of protection to non-employees assured that Petitioners' complaint would not receive an appropriate level of constitutional review. That result is unsupportable in the face of the careful consideration of the core First Amendment values at stake here, and the contrary decisions of this Court and the other courts of appeals.

II. THE COURT OF APPEALS FAILED TO CONSIDER THE PENALTY ON PETITIONERS' RIGHTS AND THE CITY'S INTEREST IN PATRONAGE.

In this case, the Seventh Circuit adhered to the reasoning of its earlier decisions in which independent contractors, because they are not employees, are treated as a class undeserving of any protection against government retaliation based on their political associations or speech. *See Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005 (1991); *Triad Associates v. Chicago Hous. Auth.*, 892 F.2d 583 (7th Cir. 1989); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 416 U.S. 1044 (1984).[5] In so doing, the Court relied upon an analytically flawed framework. The Appeals Court overlooked the substantial body of constitutional law outside of the patronage cases, and distorted the meaning of *Elrod*, *Branti*, and *Rutan* by assuming that those cases conferred additional rights on

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[5] In *Downtown Auto Parks*, the circuit court, without explanation, extended its earlier holding in *LaFalce*, which provided no protection for political association, to free speech as well. 938 F.2d at 709 n. 5.

employees which do not exist among members of the general public, including those who do business with government.

The decision here was predicated on the adoption of three factors noted in *LaFalce*, the Seventh Circuit's seminal case on contract patronage. In *LaFalce*, the plaintiffs alleged that, though they had submitted the bid most favorable to the City, the contract was given to the mayor's political supporters. 712 F.2d at 293.[6] Without defining or applying any expressed standard of constitutional review and using public employees as the norm, the Court focused on the extent to which conditioning contracts on the basis of political affiliation was likely to "interfere with the free expression of political views whether directly or through its effects on campaign contributions." 712 F.2d at 293. The Court concluded that there was comparatively little chance that independent contractors would give in to pressure to force unwanted political association because most government contractors do not rely on a single governmental entity for their livelihoods, in contrast to a government employee who is likely to have only one job. 712 F.2d at 294. In *O'Hare*, the court adopted this conclusion as its first reason for denying Petitioners' claim. P.A. 5a.

The second *LaFalce* factor adopted by the Court of Appeals was that a rule forbidding discrimination on the basis of political affiliation would invite litigation by disappointed

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[6] *LaFalce* noted that making political supporters "the beneficiaries of lucrative government contracts" was a part of "the general practice of political patronage," and that the propriety of this form of patronage had not been decided by this Court in *Elrod*. *LaFalce*, 712 F.2d at 295 (quoting *Elrod*, 427 U.S. at 353).

bidders. *Id.* This was viewed as a severe administrative consequence. *Id.*

As its final consideration, the court below, as in *LaFalce*, gave great deference to the perpetuation of the institution of patronage though it did not evaluate whatsoever any interest which the government might have in the specific practice of contract patronage.[7] Declining to reexamine the original assumptions of *LaFalce*, in light of this Court's decision in *Rutan*, the court below refused to allow Petitioners to assert a claim of political retaliation. P.A. 5a.

Petitioners submit that the court's reliance upon *LaFalce*'s speculation as to differences between employees and contractors is factually erroneous and legally irrelevant. Moreover, the failure actually to evaluate government interests in patronage contracting prevented the application of any proper standard of constitutional review.

As a preliminary but important matter, the analysis in *LaFalce* was generated in a case where the plaintiff had not been terminated from an ongoing business relationship. This might explain why that court subsequently focused only on whether the denial of business might be coercive. In contrast, here, however, Petitioners actually were terminated because Mr. Gratzianna refused to contribute and supported the opposition. ¶¶ 12-16, P.A. 22-23a. Like the *Elrod* plaintiffs, Petitioners aver that they were terminated solely on the basis of their political affiliation. *Id.*, 427 U.S. at 359 (dismissal

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[7] Petitioners discuss the governmental interests traditionally associated with patronage in Section III, *infra* at ___.

for failure to support only penalizes the exercise of protected belief and association). Speculating on the likelihood of harm in this case was not necessary.

Moreover, the Seventh Circuit's factual assumptions regarding the lack of coercion of a contractor's belief are unfounded. There is substantial variation in the size of entities doing business with government and the services which they perform. For example, in this case, O'Hare is not a large publicly held corporation but is owned and operated by Mr. Gratzianna. ¶ 2, J.A. 14; ¶ 2, P.A. 21a. This is not exceptional in the towing industry. As *Amicus* Towing & Recovery Association of America, Inc. ("TRAA") states, "[t]he towing and recovery industry is the essence of small business. The typical company is family-owned and operates four vehicles." TRAA Brief at 3. Moreover, 75 percent of the industry is dependent upon government for towing business. For these concerns, government represents 30 to 60 percent of their revenues. *Id.* at 2.[8] Finally, demand is inelastic in the towing industry and thus the government business not easily replaced. *Id.* at 9.

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[8] In *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986), the Third Circuit adopted the reasoning of *LaFalce* that there was less dependence and hence less likelihood for the coercion of political affiliation and belief among independent contractors as compared to the public employees in *Elrod*. *Id.* at 675. However, that court expressly limited its holding to the specific motor vehicle agents involved in that case, *id.* at 677, and cautioned that its opinion did not apply to a contractor with "substantial economic dependence on the state." *Id.* at 675 n. 9.

In industries like towing, where the government is the primary or significant source of business, the *LaFalce* analysis overlooks the potential cumulative effect of political retaliation. The teachers in *Abood* and the lawyers in *Keller* were compelled to associate with and support only one entity, their union or state bar organization. In contrast, a towing service may be on the rotation list of numerous municipalities and thus subject to requests for sizeable contributions from numerous officials and subject to dismissal for refusal to contribute. O'Hare, for example, provides towing services throughout Cook and DuPage Counties in Illinois. P.A. 21a, ¶ 2. Like the religious leafletters subjected to potential multiple taxation, a towing service could find itself " . . . crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village." *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 115 (1943).

As a matter of law, and contrary to the Seventh Circuit's analysis, this Court has clearly decided that the dollar amount which government seeks to compel contrary to political beliefs is not germane to determining whether the unwilling contributor's First Amendment rights were violated. Outside the patronage context, in *Chicago Teachers Union, Local No.1 v. Hudson*, 475 U.S. 292 (1986), the Court entertained a challenge to the procedures used by the union to determine the appropriate charge to be assessed against union dissenters. In reaffirming that dissenters' funds should not be used, even temporarily, to finance ideological activities, the Court stated, "the amount at stake for each individual dis-

senter does not diminish this concern. For whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear." *Id.* at 305. Similarly, the tax exemption in *Speiser v. Randall*, 357 U.S. 513 (1958), ultimately may have been a negligible amount to the taxpayer, but this Court nonetheless struck down the law without regard to its specific financial impact. *See also McIntyre*, 115 S. Ct. at 1516 (fine of $100).

This Court's patronage jurisprudence is to the same effect. In *Elrod*, this Court noted that "[t]he inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated." 427 U.S. at 361 n. 13. *Rutan*, where the employment decisions included transfers and promotions in addition to hiring recalls, confirms this conclusion. In extending *Elrod*'s protection to all of these employment decisions, this Court did not distinguish between those involving employment *vel non* and those involving a change in conditions or only incremental raises in pay. It rejected the idea that employment actions "short of termination" do not chill protected activities. Employees and contractors alike "feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold." 497 U.S. at 73. Thus, although the effects for the *Rutan* plaintiffs were not as severe as "losing your job," the ability of employees to freely choose political affiliation was protected.

Finally, in determining the Fifth Amendment rights of independent contractors, this Court has ruled that the threat of a loss of a contract to a government contractor is as great an inducement as the threat of a loss of a job to a public employee. *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973). "A significant infringement of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage." *Id.* at 84.

The second *LaFalce* factor of creating litigation also is of no legal consequence. The mere fact that affording constitutional protection for the political affiliation decisions of private individuals might cause litigation is not a reason to *deny* protection to those decisions. Acceptance of the Appellate Court's reasoning would mean that any fundamental freedom could be abridged simply to advance an interest of inhibiting litigation.

Finally, the Court's deference here to the institution of patronage without evaluating the specific interest of the City in carrying out its political retaliation against a contractor is simply inexplicable. As in *LaFalce*, the court assumed that all patronage practices not already declared unconstitutional by this Court were simply to be allowed to continue and not subject to examination by the lower federal courts.

While petitioners submit that the City's conduct was subject to the highest level of constitutional scrutiny, under any standard of review, the court was required to examine the strength and necessity of the City's interest in requiring political affiliation with, and financial support for, the Mayor

by towing companies. It also was required to evaluate the City's interest in limiting the overt political speech of these businesses outside the confines of government offices. Rather than evaluating any of these interests, the Court relied entirely upon surmise about the potential impact of contract patronage in the abstract and deferred to the characterization of the City's political retaliation as being patronage.

III. GOVERNMENT INTERESTS IN PATRONAGE DO NOT JUSTIFY THE DENIAL OF FIRST AMENDMENT RIGHTS TO ALL WHO DO BUSINESS WITH GOVERNMENT.

In this case, the Seventh Circuit gave great deference to the institution of patronage without ever analyzing government's need for a contract patronage system unbounded by the First Amendment. P.A. 5a. Thus, Respondents became the beneficiaries of the Seventh Circuit's *per se* rule that independent contractors may not challenge the denial of their associational rights. As a consequence Respondents were never required to and did not offer any specific justification for terminating O'Hare from city towing business because of Petitioners' political association. Petitioners submit that Respondents should have been required to establish the compelling interests which justify patronage practices and that the courts below similarly should have evaluated the sufficiency of those interests. Below, Petitioners review the "government interests generally asserted in support of patronage," *Rutan*, 497 U.S. at 69, and submit that those interests have even less force when applied to independent contractors.

A. Effective And Efficient Government.

Effective and efficient government is, of course, a significant interest. *Rutan*, 497 U.S. at 69. But *Elrod* and *Rutan* rejected the notion that employees who belong to a presently out-of-power party will subvert an incumbent's administration, thus fostering ineffective or inefficient government. *Elrod*, 427 U.S. at 365-68; *Rutan*, 497 U.S. at 70. Similarly, those cases rejected the argument that patronage serves efficiency because employees are motivated to make sure of the continuing incumbency of the party in power. *Elrod*, 427 U.S. at 365-68; *Rutan*, 497 U.S. at 70. The ability to discharge ineffective or subversive employees, and the availability of merit systems, adequately promote efficiency and effective government without infringing on associational rights. *Elrod*, 427 U.S. at *id*; *Rutan*, 497 U.S. at *id*.

This conclusion is equally true for non-employees who provide services to government. In this case, the City ran a merit-based program for many years. If a towing company was not performing adequately, in contrast to the facts here, P.A. 22a, ¶¶ 9, 10; 24a, ¶ 21, the City was free to terminate the company from the rotation list on that basis. For that matter, it could have terminated O'Hare for any reason other than one that is unconstitutional. *Perry v. Sindermann*, 408 U.S. 593 (1972)

The City also was free, subject to conditions already imposed by State law on towing companies, to provide, through contract, specific duties and obligations on towing companies that it utilized for services. If the towing company failed

to comply with the terms of the contract, it would be subject to termination and the consequences of its breach as it would be in its dealings with private contractual partners. There is no bar to government enforcing its contracts.[9]

Indeed, the government frequently has many more weapons in its arsenal for ensuring the performance of a contractor than it has for an employee. For example, the federal government may enforce the False Claims Act, 18 U.S.C. § 287, the False Statements Act, 18 U.S.C. § 1001, the Forfeiture Statute, 28 U.S.C. § 2514, the Anti-Kickback Act, 18 U.S.C. § 874, and the Civil False Claims Act, 31 U.S.C. § 3730. Illinois has established similar penalties for defective performance of government contracts, providing for refunds and civil penalties of up to three times the amount received by means of a false record, statement or representations; and it has enacted a provision allowing private citizens to insti-

[9] The conduct of the towing industry in Illinois, as in many states, is regulated by state law. In Illinois, a tow or wrecker operator must register with the Secretary of State, provide the Secretary with vehicle identification numbers, and proof of insurance. 625 ILCS 5/5-202(a)(b).

The Illinois Vehicle Code specifically governs identification, equipment, method of clearing debris from roads, and amounts of insurance. 625 ILCS 5/12-606. In addition, Article II of the Vehicle Code provides detailed instruction for the towing of abandoned, lost, stolen, or unclaimed vehicles. 625 ILCS 5/4-200 *et seq.* Section 4-203 enumerates the circumstances in which law enforcement agencies may authorize a towing service to remove a vehicle. Article II also imposes obligations on law enforcement authorities who authorize towing services to remove a vehicle. Both the towing service and the law enforcement agency are required to maintain certain records and reports. *See*, for example, Sections 5/4-202, 203, and 204. Given the extensive regulation of this business by the State of Illinois, there appears to be little need to further define the basic provision of towing services by contract.

tute suits for such practices. *See* Illinois Civil Procedure Act § 20 (735 ILCS 5/20-101 *et seq.*) (Recovery of Fraudulently Obtained Public Funds).

Thus, even assuming the existence of a contractor who would deliberately subvert the policies of an incumbent -- whether to sabotage the incumbent or to advance the contractor's own contrary political views -- any deficient performance in executing a contract could be heavily sanctioned. The contract and the regulatory regime, not political affiliation, provide the means of insuring government's interests in efficiency and effectiveness. As with government employees, there are means less restrictive of First Amendment rights by which the government can provide any needed supervision.

B. The Need For Politically Loyal Employees

The second interest identified in *Elrod* and *Rutan* -- the need for politically loyal employees -- also is unavailing when generally applied to government contractors. In *Elrod*, this Court held that, by limiting patronage requirements to policymaking positions, a governmental entity could adequately protect its need for employee loyalty. *Elrod*, 427 U.S. at 367; *see also id.* at 376-77 (Stewart, J. concurring) (limiting patronage to "policymaking and confidential" employees). This Court subsequently refined this exception in *Branti*. The test is "not whether the label 'policy maker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affili-

ation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518; *see Rutan*, 497 U.S. at 74.

The same should be true for services provided by independent contractors and other non-employees. For example, the City of Northlake might contract with a public relations firm to write press releases or with an attorney for advice on legal matters. Such positions may well demand political loyalty. *See Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986) (Assistant Director of Public Information, writing press releases and speeches and presenting county's views to press and public, could be terminated consistent with *Branti*); *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981) (same for city solicitor who served as chief law officer of city, represented city in legal actions and rendered legal opinions to city and its officials).

A functional analysis, however, shows that Petitioners are not in a position requiring political loyalty to the elected mayor. They do not determine the circumstances under which a tow truck will be called, nor do they even determine whether a tow truck should be called in any given instance. A tow truck on the rotation list either is available to respond to the police request to tow a stranded automobile or it is not. It either accepts the job or it rejects it. Petitioners' conduct is regulated to a significant extent by state law. *See supra* at n.9. They could not possibly be said to be in a position requiring political allegiance to the mayor. In any event, such a factual determination would more properly be made at trial after re-

mand. Thus, the interest in political loyalty cannot justify a blanket abrogation of the First Amendment rights of *all* independent contractors.

C. Preserving The Democratic Process

The final interest advanced in *Elrod* was that of preserving the democratic process, an argument premised on the idea that partisan politics is central to that process. 427 U.S. at 368. This Court questioned whether eliminating patronage would in fact hamper the democratic process since political parties existed prior to extensive patronage practices and continue despite the decline of patronage. The Court noted that the process functions as well as or better *without* patronage practices, for these "clearly retard" the democratic process by entrenching incumbent parties and by impeding free speech and association. *Id.* at 369-70. Patronage thus is not the least restrictive alternative of achieving whatever such practices do contribute. *Id.* at 368-69; *see also Rutan*, 497 U.S. at 74-75.

The practice of contract patronage raises no different considerations. By being forced to affiliate politically as a condition of doing business, contractors, like government employees, are given a choice: affiliate with a party or candidate whose position one may wish to reject, or abandon the possibility of doing business with government. As with employees, such a practice skews the democratic process by providing incentive to affiliate with a particular party -- the party perceived as the most likely to win and thus distribute pa-

tronage spoils -- regardless of one's actual beliefs.

Moreover, patronage contracting does not advance party discipline and party strength, whatever one may believe about the effects of patronage employment. *See Rutan*, 498 U.S. at 103-04 (Scalia, J., dissenting). At the local level, where contractors may be the most vulnerable to contract patronage, the practice is more likely to compel "candidate" affiliation rather than "party" affiliation. Under Illinois law, the mayor of Northlake is chosen in a nonpartisan election[10] and the Petitioners were asked to contribute to Respondent Paxson's campaign, not to a particular political party. *See Buckley v. Valeo*, 424 U.S. at 22 (giving money affiliates one with a candidate). Thus the interests of "party" are secondary, if present at all.

In addition, contrary to the patronage armies of working people who purportedly become active in politics through the practice of patronage employment, contract patronage generally seeks dollars, not personal participation. Contract patronage does not generate a need for more workers, but to the contrary provides resources for purchases of professional services and media advertising, thus obviating the need for le-

[10] By state statute, municipal elections are nonpartisan, and party designations may not appear on the ballot. 65 ILCS 5/3.1-25-35; 65 ILCS 5/3.1-25-50 (primary and general elections, villages and towns); 65 ILCS 5/4-3-10, 65 ILCS 5/4-3-16 (primary and general elections, commission form of government). Under current Illinois law, aldermen of the City of Chicago are also elected in nonpartisan elections. 65 ILCS 20/21-32. The General Assembly of Illinois has recently amended the State's Election Code to provide that future elections for Mayor of the City of Chicago will be nonpartisan. Public Act 89-95, July 7, 1995.

gions of "volunteer" workers. *Cf. Branti*, 445 U.S. at 528 and n.9 (candidate who cannot attract substantial contribution must rely upon party workers to bring his message to voters, but media enables well-financed candidates to go directly into voters' homes more effectively than even the most well-organized political machine). Mr. Gratzianna was asked to give money, not to ring doorbells.

Furthermore, because the "contribution" is requested from commercial entities, if Judge Posner is correct in *LaFalce*, money, not ideology, is the controlling force which mandates the "cautious neutrality" of American business. *LaFalce*, 712 F.2d at 294. This motivation is more likely to break down party structures than it is to maintain and strengthen them. Thus in a classic work on patronage, *To The Victor*, the authors recount the ire of Republican party leaders over the fact that former party officials were donating money to Lyndon Johnson's President's Club and receiving contracts in return. Contrary to building party loyalty or strengthening the two-party system, contract patronage undermines these interests. The authors write:

> Maintaining that architectural and engineering contracts were awarded arbitrarily without legislative or public oversight, the Republicans resented the opportunities for patronage which cut so deeply into the structure of the Republican Party. What motivations existed for maintaining party loyalty, they asked, in the face of such overwhelming patronage bait dangled so flagrantly from the executive branch of government?

Id. at 276.

Finally, contract patronage advances only *incumbent* party strength, just as the incumbency of Respondent Mayor was served by requiring political affiliation as a condition of doing business with the City. *See Rutan* 497 U.S. at 87 n.4 (Stevens, J., concurring) (patronage use to protect entrenched majority). While Justice Scalia connects party strength to an interest in the two-party system, *Rutan,* 497 U.S. at 106 (Scalia, J. dissenting), even if patronage did advance more than incumbency, it is questionable whether government has a compelling interest in perpetuating a *two-party* system. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court struck an early-filing deadline for candidates that was purportedly justified, in part, by "political stability." This Court observed that the interest "amounts to a desire to protect existing political parties from competition." *Id.* at 801.

As in *Anderson*, this Court should reject the theory that "a political party could invoke the powers of the State to assure monolithic control over its own members and supporters." *Id.* at 803. That is precisely what has happened here. Moreover, contract patronage further entrenches incumbents at the expense of new candidates by siphoning off funds that might otherwise be donated to newcomers. *Cf. Norman v. Reed*, 502 U.S. 279 (1992); *Illinois State Bd. v. Socialist Workers Party*, 440 U.S. 173 (1979). Any interest that may be asserted in requiring the political affiliation and support of Mayor Paxson by independent contractors such as Petitioners is nothing more than an interest in maintaining Mayor

Paxson's control over the City.

In sum, the interests traditionally asserted to justify patronage are woefully inadequate to legitimize the City's practice of political retaliation. It neither serves government's operational efficiency nor contributes meaningfully to the democratic process.

CONCLUSION

For these reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed. The case should be remanded to the United States District Court for the Northern District of Illinois.

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In The

Supreme Court of the United States

October Term, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

vs.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TABLE OF CONTENTS

	Page
Table of Citations	ii
Summary of Argument	1
Argument	2
I. The *Elrod, Branti* and *Rutan* holdings should not be extended to independent contractors.	2
A. Extending *Elrod, Branti* And *Rutan* Raises Unworkable Problems For Governmental Entities, Unnecessarily Restricting Their Effectiveness And Efficiency.	6
B. Such An Extension Of *Elrod, Branti* And *Rutan* Raises Unworkable Problems For The Judiciary Restricting Its Effectiveness And Efficiency.	14
II. Assuming, *arguendo*, this Court fashions a First Amendment test applying to independent contractors, it should be one based on a "reasonableness" rather than a "strict scrutiny" standard.	15
III. This case presents the Court with the opportunity to overrule what has become unworkable precedent in *Rutan*, if not in *Elrod* and *Branti* as well.	21
Conclusion	23

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Branti v. Finkel, 445 U.S. 507 (1980) ..... *passim*

Breuer v. Hart, 909 F.2d 1035 (7th Cir. 1990) 18

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 1, 15

Brown v. Glines, 444 U.S. 348 (1980) 21

Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973) 1

Connick v. Meyers, 461 U.S. 138 (1983) 16, 19

Downtown Auto Parks, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir. 1991), *cert. denied*, 502 U.S. 1005 (1991) 10

Elrod v. Burns, 421 U.S. 347 (1976) ..... *passim*

Fox and Co. v. Schoemehl, 671 F.2d 303 (8th Cir. 1982) .. 6

Horn v. Kean, 796 F.2d 668 (3rd Cir. 1986) 11

LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984) 6, 7, 8, 9

Contents

Page

Lundblad v. Celeste, 874 F.2d 1097 (6th Cir. 1989), *vacated*, 882 F.2d 207 (6th Cir. 1990), *reinstated in part*, 924 F.2d 627 (6th Cir. 1991) 11

Perry v. Sindermann, 408 U.S. 593 (1972) 3

Pickering v. Board of Education, 391 U.S. 562 (1968) 15, 16, 17, 21

Public Worker's v. Mitchell, 330 U.S. 75 (1947) 1, 15, 21

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) ..... *passim*

Selch v. Letts, 5 F.3d 1040 (7th Cir. 1993) 18, 19, 20

Soderstrum v. Town of Grand Isle, 925 F.2d 135 (5th Cir. 1991) 18

Stegmaier v. Trammell, 597 F.2d 1027 (5th Cir. 1979) .. 18

Sweeney v. Bond, 669 F.2d 542 (8th Cir. 1982) 6

Tarplay v. Jeffers, et al., (7th Cir. Docket No. 95-2084) 14

Triad Associates, Inc. v. Chicago Housing Authority, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990) 9, 10

Contents

	Page
Umbehr v. McClure, 44 F.3d 876 (10th Cir. 1995), argued November 28, 1995, *sub nom. Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*	2, 14
United States v. National Treasury Employers Union, __ U.S. __, 115 S. Ct. 1003 (1995)	1, 16
Vickery v. Jones, 865 F. Supp. 1313 (S.D. Ill. 1994), *appeal pending*, Nos. 96-1055, 96-1153 (7th Cir.)	13, 17, 19
Waters v. Churchill, __ U.S. __, 114 S. Ct. 1878 (1994)	1, 16
United States Constitution Cited:	
First Amendment	*passim*
Fourteenth Amendment	9

SUMMARY OF ARGUMENT

Elrod, Branti and *Rutan* mark a departure from this Court's prior decisions in *Public Worker's v. Mitchell*, 330 U.S. 75 (1947); *Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and more recent decisions in *United States v. National Treasury Employers Union*, __ U.S __, 115 S. Ct. 1003 (1995) and *Waters v. Churchill*, __ U.S. __, 114 S. Ct. 1878 (1994). Instead of the deferential approach employed in this line of cases, *Elrod, Branti* and *Rutan* apply a strict scrutiny standard when analyzing First Amendment issues arising out of state and local employment.

The strict scrutiny standard should not be extended to this First Amendment case arising from Petitioners' work as an independent contractor in the City of Northlake. Such an extension of *Elrod, Branti* and *Rutan* in this case is not only inconsistent with the deferential approach described above, it also raises unworkable problems for local governmental entities and for the judiciary, restricting both in their effectiveness and efficiency.

However, even if the strict scrutiny standard were applied here, Northlake did not unconstitutionally infringe on Petitioners' First Amendment rights. Northlake's action was, in fact, narrowly tailored to further a vital governmental interest. Northlake has no other effective means to further the vital governmental interest of providing effective and efficient municipal services unless it has the power to terminate or not renew relationships with independent contractors pursuant to which such services are provided.

Likewise, if the exception (recognized by *Elrod, Branti* and *Rutan*) to the strict scrutiny standard is applied, Northlake did not unconstitutionally violate Petitioners' First Amendment

rights. As independent contractors, who operate without supervision from the City of Northlake, Petitioners are analogous to the high ranking employees described in *Branti* and *Rutan* who may be dismissed for political reasons without violating the First Amendment.

Under any First Amendment analysis, whether it be the deferential approach, the strict scrutiny test, or the exception thereto, Petitioners fail to state a claim. In addition, this Court may consider overruling at least *Rutan*, if not *Elrod* and *Branti*, as an alternative to extending those decisions into the context of First Amendment issues that arise between governmental entities and independent contractors. For all of the foregoing reasons, this Court should affirm the decision below of the Seventh Circuit Court of Appeals.

ARGUMENT

I.

THE *ELROD, BRANTI* AND *RUTAN* HOLDINGS SHOULD NOT BE EXTENDED TO INDEPENDENT CONTRACTORS.

This case, along with *Umbehr v. McClure*, 44 F. 3d 876 (10th Cir. 1995) (94-1654, argued November 28, 1995, *sub nom. Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*), provides this Court, for the first time, the opportunity to address the issue of what, if any, First Amendment rights an independent contractor has in the context of performing work for a governmental entity.

Prior hereto, this court has addressed the issue of First Amendment rights in the limited context of a governmental employer/employee relationship. In that context, this Court has

struggled mightily with attempting to fashion not only a test to be applied in determining whether a constitutional violation has occurred but also in determining to whom such a test should be applied.

For example, in *Elrod v. Burns*, 421 U.S. 347 (1976), this Court, in a plurality opinion, decided that a newly elected sheriff could not constitutionally replace certain office staff personal with members of his own party when the employees being replaced failed to support or affiliate with the party in power. Support for that holding was found in *Perry v. Sindermann*, 408 U.S. 593 (1972), which held that the state's refusal to renew a teacher's contract because he had been publicly critical of its policies, imposed an unconstitutional condition on the receipt of a public benefit. Nonetheless, the plurality in *Elrod* did acknowledge that a government has a significant interest in insuring that it has effective and efficient employees.

This Court arrived at a similar conclusion in *Branti v. Finkel*, 445 U.S. 507 (1980), even though it decided that the First Amendment prohibited a newly appointed public defender from firing assistant public defenders because they did not support the party of which the newly elected public defender was a member.

In both *Elrod* and *Branti* this Court carved out exceptions for certain employees. The exception outlined in *Elrod* provided that policymaking employees or employees in confidential positions could be dismissed on the basis of their political views. *Elrod, supra*, 421 U.S. at 367. In *Branti*, the court found that a state demonstrates a compelling interest for political firings when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti, supra*, 445 U.S. at 518.

The third in this line of cases is *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In that case, a sharply divided court extended the holdings in *Elrod* and *Branti* to promotion, transfer, recall and hiring decisions based on party affiliation and support. The exceptions found in *Elrod* and *Branti* were not an issue in *Rutan* as it was conceded that the employees involved in *Rutan* would not fall within the exceptions. *Id.* at 71, footnote 5.

However, this Court, in *Rutan*, was sharply divided with Justice Scalia, who was joined by the Chief Justice and Justice Kennedy, in whole, as well as by Justice O'Connor, in part, authoring the dissent. In his dissent, Justice Scalia observed:

> Today the Court makes its constitutional civil service reform absolute, extending to all decisions regarding government employment. Because the First Amendment has never been thought to require this disposition, which may well have disastrous consequences for our political system, I dissent.

Id., at 94.

As cogently observed by Justice Scalia:

> Once it is acknowledged that the Constitution's prohibition against laws "abridging the freedom of speech" does not apply to laws enacted in the government's capacity as employer in the same way as it does to laws enacted in the government's capacity as regulator of private conduct, it may sometimes be difficult to assess what employment practices are permissible and

> what are not. That seems to me not a difficult question, however, in the present context. The provisions of the Bill of Rights are designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, wide spread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed.

Id., 95-96.

It is in that context that this case, involving whether a governmental entity may for political reasons terminate the services of an independent contractor, must be decided. Respondents submit that such considerations are constitutionally permissible and for this Court to hold otherwise would do nothing more than foster uncertainty, indecision, and second guessing which would result in the federal judiciary being inundated with lawsuits by any independent contractor who felt that the decision to retain or not retain its services was politically motivated. This Court's decisions in *Elrod, Branti* and *Rutan* should not be extended to independent contractors.

The *Rutan* dissent and the weight of persuasive authority in the better reasoned opinions in the Courts of Appeals support that result.

A. Extending *Elrod*, *Branti* And *Rutan* Raises Unworkable Problems For Governmental Entities, Unnecessarily Restricting Their Effectiveness And Efficiency.

The first circuit to address this issue in the context of independent contractors was the Eighth Circuit in the cases of *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982) and *Fox and Co. v. Schoemehl*, 671 F.2d 303(8th Cir. 1982),

In *Sweeney*, the plaintiffs alleged their dismissals were based solely on their political affiliation and argued they were protected from such dismissals by the holdings in *Elrod*, *supra* and *Branti*, *supra*. In deciding that the plaintiffs in *Sweeney* did not fall within the protection of *Elrod* and *Branti*, the Eighth Circuit found it dispositive that those two Supreme Court decisions were limited to dismissals of *public employees* for partisan reasons. *Id.*, at 545. Consequently, the Eighth Circuit was "not willing to extend the patronage decisions to cases which do not involve public employees." *Id.*, at 545. As a result, once it was determined that the fee agents in *Sweeney* were not public employees but more in the nature of independent contractors, the trial court's holding that the plaintiffs were not protected from dismissal based on political affiliation was affirmed.

The Seventh Circuit has, in a line of cases culminating in the instant case, repeatedly held that independent contractors are afforded no protection from removal based on political considerations. The first such case was *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U. S. 1044 (1984). In that case the plaintiff had submitted a bid to the city of

Springfield on behalf of his business to install and maintain benches along city streets. He alleged that his bid was the most favorable to the city but that, nonetheless, the mayor had the contract awarded to another bidder who was one of the mayor's political supporters while the plaintiff was not. The district court dismissed plaintiff's complaint and that dismissal was affirmed by the Seventh Circuit.

In affirming the district court's dismissal, the Seventh Circuit observed that the practice of favoring political supporters and awarding contracts for public projects has a long history at the federal as well as the state and local levels. It acknowledged as hardly open to question that such a practice could interfere with the free expression of political views whether directly or through its effect on campaign contributions. *Id.*, at 293. Nonetheless, the court considered the extent of the likely interference as being outweighed by the consequences of trying to prevent it through an interpretation of the Constitution and held that political considerations in the awarding of public contracts to independent contractors are permissible.

The Seventh Circuit noted that it is not the end of world if a government contractor does not get the particular government work which it seeks due to the fact that the contractor is on the outs with the incumbent as there are other sources of business for such contractors. Of note in that regard is that the Petitioners herein apparently have many sources of business as alleged in their complaint. (*See* appendix to Petition for Writ of Certiorari, page 21a) In paragraph two of Petitioners' First Amended Complaint, they allege that "O'Hare Truck Service, Inc., in addition to other services, provides towing services at the request of municipalities throughout Cook and DuPage counties." It is apparent that Petitioners rely only partially on any income from towing services received by being on the rotation list in Northlake.

The Seventh Circuit further observed that because at least some government work is dispensed on a partisan basis, "modern American life has made it important for business firms to be on good terms with the major political groupings in the society. It seems unlikely that the cautious neutrality that characterizes the politics of American business would be altered even by an ironclad constitutional rule against allowing politics to influence the contracting process." *Id.*, at 294. That court further went on to explain:

> To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable. Patronage in one form or another has long been a vital force in American politics. Civil service laws . . . requiring public contracts to be awarded to the low bidder, laws regulating the financing of political campaign, and decisions such as *Elrod* and *Branti* have reduced the role of patronage in politics but have not eliminated it entirely. The desirability of reducing it still further raises profound questions of political science that exceed judicial competence to answer . . . *we are reluctant to tamper with political institutions when the competing First Amendment interests are as attenuated as they appear to be here.*

Id., at 294 (emphasis added)

The court also noted there was a practical consideration in

its decision, that being that to hold otherwise would invite every disappointed bidder for a public contract to bring a federal lawsuit against the governmental entity involved. That could literally occur with respect to any item of governmental work performed by independent contractors as in virtually every instance there is more than one entity competing for that work.

The next Seventh Circuit case addressing this was *Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 498 U.S.845 (1990). Triad was a security firm hired by the Chicago Housing Authority to provide security services beginning in 1982. After a change of administrations in Chicago, Triad alleged that the CHA began to intimidate, harass and ultimately drive it and other white employees and contractors from the ranks of the CHA and replace them with black employees and contractors who supported the political aspirations of the new administration. Triad filed a seven count complaint against the CHA, one of which alleged that the CHA's actions violated Triad's rights of free association and speech as guaranteed by the First and Fourteenth Amendments, allegations which are essentially the same as the Petitioners' allegations in this case.

Although the Seventh Circuit noted that the *Triad* case was not factually parallel to the circumstances in the *LaFalce* case it emphasized that the rationale underlying that decision was the difference that existed with respect to the business relationship of the parties involved. In affirming the district court's dismissal of Triad's First Amendment claim, the Seventh Circuit held that:

> The decisions in both *LaFalce* and *Horn* were grounded upon the distinction between "independent contractors" and "public employees" and the extent to which this distinction was dispositive of the First

> Amendment issue. In that Triad is an "independent contractor" we, hold that our decision in *LaFalce* is binding and that Triad is not protected under the First Amendment in this context.

Id., at 588.

Petitioners have conceded in this Court that they are independent contractors as far as their relationship with the City of Northlake is concerned. *See* Petitioners brief, page 9. Consequently, as correctly decided in the court below, petitioner's First Amendment claims should properly be rejected. The Seventh Circuit, *subsequent* to this Court's *Rutan* decision once again affirmed its position with respect to independent contractors in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991), *cert. denied*, 502 U.S 1005 (1991). In again refusing to extend the *Elrod* and *Branti* decisions to independent contractors despite the then recent holding in *Rutan*, the Seventh Circuit stated:

> While recognizing that *Rutan* has altered some of the assumptions upon which the *LaFalce* and *Triad* decisions were based, we affirm the continued validity of those earlier cases. *Rutan* did extend First Amendment protection, but only within the context of government employment . . . we continue to concur in the view taken by the other circuits and hold that political favoritism in the awarding in public contracts is not actionable.

Id., at 710.

As was very eloquently observed by the Third Circuit Court of Appeals in *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986), when that court affirmed a motion for summary judgment in favor of various state of New Jersey officials and against independent contractors who were individuals removed from their positions solely because of their political affiliation:

> . . . [We] embrace the proposition that application of the First Amendment has never been considered as absolute dogma that runs roughshod over other fundamental values. We recognize that in adding the formidable gloss to the naked constitutional text of "Congress shall make no law . . ." the courts have applied a balancing approach. Having weighed interests implicated here, we are persuaded first, that the independent contractors in this case differ in significant respects from public employees and, second, that the distinctions lead to different first amendment treatments of the two classifications. As the force of a first amendment assault on state patronage practices moves from public employment into the outer spheres of political life, we are extremely hesitant to realign radically, in the name of the Constitution, a political constellation that has been with us since the Republic was formed.

Id., at 677.

The Sixth Circuit Court of Appeals has also considered and followed these cases in *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989), *vacated*, 882 F.2d 207 (6th Cir. 1990), *reinstated in part*, 924 F.2d 627 (6th Cir. 1991) (*en banc*).

Affirming the Seventh Circuit's decision below eliminates the potentially "disastrous results" predicted by Justice Scalia in his *Rutan* dissent. For example, once a municipality lets an independent contract, its problems are not limited to First Amendment suits from unsuccessful bidders. The successful bidder could later seek a rate increase and simultaneously, publicly endorse the opposition. If the contract would then not be renewed by the incumbent, but instead was given to a lower bidder; under Petitioners' theory, the municipality would face a First Amendment claim alleging that the contract was not renewed in retaliation for expression of political views or for political association.

Furthermore, because most independent contracts are of limited duration, every new administration will have occasion to review, terminate or renew contracts made by the preceding administration. If a new administration decides to terminate or not renew its predecessors' contracts; under Petitioners' analysis, each such decision will subject each new administration to a federal First Amendment lawsuit. There is no basis in the Constitution to so encumber the governmental decision-making process. Presumably, the electorate expects change when voting in a new administration. The First Amendment should not provide vague and abstract restrictions on a new administration's efforts to carry out such a mandate.

For example, administrations are often voted out because of the electorate's perception that public services are inadequate. This is true whether the voter perception is accurate or not. Under Petitioners' analysis, an independent contractor who provided any of those public services and was replaced by the new administration would have the basis for filing a First Amendment lawsuit because, from its perspective, the only thing that changed was the administration. Therefore, contract non-renewal would have been based solely on political association

with the prior administration. Under this scenario, the new administration should not have to defend such First Amendment claims for simply following the expressed will of the electorate.

Finally, the government loses direct control over a job that has been assigned to an independent contractor. The contractor becomes vested with the right to control the manner and method of how that job is carried out on a day to day basis. As a result, the government must retain some method of controlling the independent contractor without having to wait for a disruption of some type in service. *See Vickery v. Jones*, 865 F. Supp. 1313 (S.D.Ill. 1994), *appeal pending*, Nos. 96-1055, 96-1153 (7th Cir.). It is the government that is looked to by its citizens for the provision of certain public services and it is the government that is held accountable for any problems in the provision of those services. Consequently, control over independent contractors must be exercised by the government without having to resort to some tortured First Amendment analysis each time the services of a specific independent contractor are no longer needed or desired. As Justice Scalia commented in his dissenting opinion in *Rutan*:

> In sum, I do not deny that the patronage system influences or redirects, perhaps to a substantial degree, individual political expression and political association. But like the many generations of Americans that have preceded us, I do not consider that a significant impairment of free speech or free association.

Rutan, supra, 497 U.S at 110.

B. Such An Extension Of *Elrod*, *Branti* And *Rutan* Raises Unworkable Problems For The Judiciary Restricting Its Effectiveness And Efficiency.

The Tenth Circuit's recent decision in *Umbehr, supra*, acknowledges that its decision places it squarely in conflict with several other circuits. The *Umbehr* court's holding that an "independent contractor is protected under the First Amendment from retaliatory governmental action, just as an employee would be" (*Umbehr, supra*, 44 F.3d at 883) is unworkable and will lead to a never-ending stream of lawsuits by any disgruntled contractor who has or was interested in doing work for a governmental entity but which no longer was doing so.

On balance, extending the holdings in *Elrod, Branti* and *Rutan*, to also apply to independent contractors who work for governmental entities, would foster unlimited litigation due to the uncertainty in attempting to apply whatever rule of law that might be fashioned in this context. This is evidenced by making a simple comparison between the very small number of First Amendment cases involving independent contractors and the virtually unlimited number of First Amendment cases involving disputes between government employees and government employers.

The ensuing flood of litigation would not be limited only to independent contractor cases. These same issues will have to be considered in the context of state or local governments and their part-time as well as their temporary employees. In fact, these very issues are now pending before the Seventh Circuit Court of Appeals in *Tarpley v. Jeffers, et al.* (7th Cir. Docket No. 95-2084) and in *Vickery v. Jones, supra*. There are a myriad of part-time and temporary employment decisions that, according to Petitioners, would also be subject to First Amendment claims under *Elrod, Branti* and *Rutan*.

To extend First Amendment protection to independent contractors in this context as is advocated by the Petitioners would only provide further extremely fertile grounds for future litigation, but any potential chilling effect on First Amendment rights by refusing to extend these rights to this case would be, in Justice Scalia's words, not a "significant impairment of free speech or free association." Consequently, the *Elrod, Branti* and *Rutan* line of cases should not be extended to independent contractors and this Court should affirm the Seventh Circuit's opinion below which so holds.

II.

ASSUMING, *ARGUENDO*, THIS COURT FASHIONS A FIRST AMENDMENT TEST APPLYING TO INDEPENDENT CONTRACTORS, IT SHOULD BE ONE BASED ON A "REASONABLENESS" RATHER THAN A "STRICT SCRUTINY" STANDARD.

There is ample precedent for applying a reasonableness standard in this context. Long before the *Elrod* decision, this Court had, in upholding legislation prohibiting political activities by federal employees, stated that it was not necessary that the activity regulated be anything more than an activity *reasonably* deemed by Congress to interfere with the efficiency of public service. *See Public Workers v. Mitchell*, 330 U.S. 75 (1947). Likewise, in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), this Court upheld restrictions on state employees even though those restrictions were directed at political expression that, if it had been engaged in by private individuals, would have been protected by the First Amendment.

Similarly, a balancing test in the context of an adverse employment action against a public employee because of his speech was fashioned in *Pickering v. Board of Education*, 391 U.S. 562 (1968), where this Court stated:

> . . . the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the (employee), as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public service it performs through its employees.

Id., at 568.

More recently, in *Connick v. Meyers*, 461 U.S. 138 (1983), this Court gave a wide degree of deference to the employer's judgment when applying that balancing test. Most recently in *United States v. National Treasury Employees Union*, __ U.S. __, 115 S. Ct. 1003 (1995) and *Waters v. Churchill*, __ U.S. __, 114 S. Ct. 1878 (1994), this Court again showed deference in the governmental employment context. So too, a governmental entity should be given wide deference in its decision-making process with respect to independent contractors.

Despite the reasonableness standard evidenced in the public employer/employee free speech setting, the case law has unfortunately evolved to the application of a "strict scrutiny" standard in the public employer/employee freedom of association setting. *See Elrod, Branti, Rutan, supra.* In *Rutan* the five to four majority opinion written by Justice Brennan decided that "unless these patronage practices are narrowly tailored to further vital governmental interests, we must conclude that they impermissibly encroach on First Amendment freedoms." *Rutan, supra*, 497 U.S at 74. As Justice Scalia points out in his dissenting opinion, "that strict scrutiny standard finds no support in our cases." *Id.*, at 98.

As stated above, Respondents urge this Court not to, in the instant case, extend the *Elrod, Branti* and *Rutan* line of cases. Assuming, *arguendo*, this Court decides to adopt any test at all, the test that should be applied in the independent contractor context should be one of reasonableness and deference under *Pickering* and its progeny, not the strict scrutiny test applied in *Rutan*. Nonetheless, even under the heightened standard applied in *Rutan*, Petitioners' removal from the towing rotation list would not violate Petitioners' First Amendment rights.

The strict scrutiny standard within *Elrod, Branti* and *Rutan* provides that unless patronage practices are narrowly tailored to further government interests, they impermissibly encroach on First Amendment freedoms. *Rutan, supra*, 487 U.S. at 74

With an independent contractor, a municipality can only effectively control conduct through the right to terminate or the right to not renew the contract. *See Vickery v. Jones, supra.* Any limitation on governmental ability to terminate, or not rehire, an independent contractor effectively destroys governmental ability to control public services. This right to terminate or not rehire is narrowly tailored; it is the only effective method available of government control over independent contractors. The right to terminate or not rehire furthers a vital governmental interest: efficiency and effectiveness of operation.

Section I, *ante*, demonstrates numerous examples and practical considerations showing the right to terminate or not rehire an independent contractor furthers efficient and effective governmental operation. Those examples apply equally, but need not be restated, here. Therefore, because the right to terminate or not rehire is narrowly tailored and relates to a vital governmental interest, Respondents' actions here do not violate the First Amendment even under strict scrutiny analysis.

In addition, the policy maker/confidential employee exception to this strict scrutiny standard outlined by this Court in *Branti* recognized that:

> party affiliation may be an acceptable requirement for some government employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. In sum, the ultimate inquiry is not whether the label "policy maker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, supra, 445 U.S. at 517-518.

Under that exception, a wide range of public employees have been found to hold positions in which the government was able to "demonstrate that party affiliation is an appropriate requirement for the effective performance" of the particular job involved. Those included a deputy sheriff (*Breuer v. Hart*, 909 F.2d 1035 [7th Cir. 1990]); a secretary to a police chief (*Soderstrum v. Town of Grand Isle*, 925 F.2d 135 [5th Cir. 1991]); a deputy clerk (*Stegmaier v. Trammell*, 597 F.2d 1027 [5th Cir.1979]); and a subdistrict superintendent for a highway department (*Selch v. Letts*, 5 F.3d 1040 [7th Cir., 1993]).

It should be without question that the political loyalty of independent contractors who perform governmental services is

related to the effective performance of the function involved. Since they do not have supervisors who monitor their work, they are similar to supervisors or decision makers which *Branti* allowed to be selected or dismissed based on political affiliation. *See also, Vickery v. Jones, supra.*

The Seventh Circuit, in affirming the dismissal of the subdistrict highway superintendent in *Selch*, stated:

> Elected officials cannot implement the policies that they were elected to carry out and, hence, the will of the electorate cannot be effectuated, unless the officials can install their political allies in the most sensitive jobs. *Id.*, at 1044. While there is no indication that Selch would not effectively perform his duties, "actual disruption nor disturbance need not be proved" (citation omitted) once the employee is classified (as exempt for First Amendment protection), he can be fired on political grounds even if there is no evidence that he would not serve his political superiors loyally and competently.

Id., at 1046-1047.

This observation is underscored by the *Connick* Court's statement that "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick, supra*, 461 U.S. at 152.

One of Selch's responsibilities was to handle various requests with respect to street maintenance and repairs, etc. The Seventh Circuit noted significant evidence in political life that

the failure to properly provide services such as snow removal from highways could adversely impact on the chief executive of a state or a government charged with providing such services. In particular, the Seventh Circuit observed that the incumbent is widely regarded as having lost the 1979 Chicago Mayoral election due to snow removal problems.

That concept is of import in the instant case where an independent contractor is providing public services to the citizens of Northlake. As noted previously, an independent contractor has little or no supervision over the manner or method in which it performs its job. That coupled with Petitioners' open support for Mayor Paxson's opponent (placing opposition campaign posters in Petitioners' place of business) certainly provides Petitioners with the opportunity, in providing public services, to adversely impact the chief executive of Northlake, who is charged with providing those public services. In particular, as alleged by Petitioners in their First Amended Complaint (*see* Petition for Writ of Certiorari, page 21a), the public service being provided is "when the need arises for the towing of a vehicle, as a result of an accident, mechanical breakdown, abandonment or other reason, plaintiff (Petitioner) is contacted by the municipality where the vehicle is located and asked to provide towing services."

As the *Selch* court teaches, actual disruption or disturbance need not be proved. Once an employee is classified as exempt from First Amendment protection, political firings are constitutionally permissible even without actual evidence of disloyalty or incompetence. Similarly, in the instant case, the City of Northlake is not required to wait and see if the Petitioners, once the candidate they supported was defeated, would for political reasons attempt to disrupt or otherwise adversely affect municipal services.

As indicated above, however, it is Respondents' position that if this court decides to apply a test in this area, it should be the reasonableness and deferential test discussed in *Pickering* and its progeny. That should be so whether the issue is freedom of speech or freedom of association. As observed by Justice Scalia in his *Rutan* dissenting opinion, "since the government may dismiss an employee for political *speech* "reasonably deemed by Congress to interfere with the efficiency of the public service," (citation omitted), it follows, *a fortiori*, that the government may dismiss an employee for political affiliation if "reasonably necessary to promote effective government." (citing *Public Workers v. Mitchell, supra* and *Brown v. Glines*, 444 U.S 348 [1980]).

As demonstrated above, under any test this Court may fashion, there is no First Amendment violation, and therefore this Court must affirm the Seventh Circuit's opinion below, which so holds.

III.

THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO OVERRULE WHAT HAS BECOME UNWORKABLE PRECEDENT IN *RUTAN*, IF NOT IN *ELROD* AND *BRANTI* AS WELL.

It is difficult to find a more unworkable rule of law than that which has evolved from the *Elrod, Branti* and *Rutan* line of cases. The inconsistencies which these cases have spawned are discussed in considerable detail by Justice Scalia in his dissenting opinion in *Rutan, supra* at 111-113. If those and subsequent cases are not reason enough to overrule that line of cases, then the mere consideration that the line of cases could be extended to independent contractors, part-time and temporary employees should most certainly convince one of that necessity.

As observed by Justice Scalia, the "test" devised to implement *Branti* has produced inconsistent and unpredictable results. That uncertainty undermines the purpose of both the non-patronage rule and its exception, *Rutan, supra*, 497 U.S. at 112.

Obviously, this Court should not treat lightly a request to overrule past precedent in light of not only the importance, but the necessity, of the doctrine of *stare decisis*. Nonetheless, when a rule of law becomes unworkable, it should be corrected. As stated by Justice Scalia:

> Even in the field of constitutional adjudication where the pull of *stare decisis* is at its weakest, see *Glidden Company v. Zdanok*, 370 U.S. 530, 543 (1962)(opinion of Harlan, J.), one is reluctant to part from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice then all reluctance ought to disappear.

Rutan, supra, 497 U.S. at 110-111.

In discussing the subject of party-based employment Justice Scalia makes this cogent observation on how that subject would be dealt with if these cases were overruled and why the federal judiciary should not be involved in dealing with this subject:

> The answer to that (party-based employment) will vary from State to State, and indeed from city to city, even if one rejects out of hand (as the *Branti* line does) the benefits associated with party stability. Indeed, the answer will even vary from year to year . . . the appropriate "mix" of party-based employment is a political question if ever there was one, and we should give it back to the voters of the various political units to decide, through civil service legislation crafted to suit the time and place, which mix is best.

Rutan, supra 497 U.S. at 113-114.

Before continuing to subject state and local governments, and their political officials, to such an unworkable framework as has evolved from the *Elrod, Branti* and *Rutan* line of cases in the public employment context; and certainly before extending that line of cases to include independent contractors, this Court should re-evaluate the wisdom of continuing to enforce the legal theories which originated, and have evolved from, those cases. In doing so, the wisdom of placing the subject of party-based employment back into the hands of the voters and their elected representatives, to be decided at the state and local level, becomes apparent.

Respondents defer to the Brief of Illinois State Officials as *Amicus Curiae* for more detailed argument on this issue.

CONCLUSION

Petitioner's invitation to this Court to extend the *Elrod, Branti* and *Rutan* line of cases to give First Amendment protection to independent contractors should be rejected as unworkable and untenable. The *Rutan* dissent together with the weight of persuasive authority in the Circuit Courts of Appeals provide this Court with sound and reasoned precedent to reject Petitioners' arguments and affirm the ruling below of the Seventh Circuit Court of Appeals.

Any other conclusion will result in giving independent contractors unfettered access to the courts by giving every disappointed independent contractor the ability to file a lawsuit based on the First Amendment. The potential for uncertainty in the law if any such extension is made is evident when considering not only the number, but also the inconsistent results, in First Amendment cases that have been decided since *Elrod* in the employment context. Such uncertainty can, and should, be avoided by this Court affirming the ruling of both the District Court and the Court of Appeals below which dismissed Petitioners' First Amendment challenge on the basis of their status as independent contractors.

If this Court decides to extend independent contractors any First Amendment protection at all, the applicable analysis is one of reasonableness and deference as espoused by this Court both prior and subsequent to the *Elrod, Branti* and *Rutan* line of cases. Under such an analysis, Petitioners fail to state a claim. Likewise, even under the *Elrod, Branti* and *Rutan* strict scrutiny test or its exception, Petitioners fail to state a claim.

Finally, before this Court decides to extend the *Elrod* line of cases to independent contractors who work for governmental entities, the Court should evaluate and review the unworkable framework and unpredictable results that have occurred in this area of the law. In so doing, this Court has the opportunity to overrule *Rutan*, if not *Elrod* and *Branti* as well and return the subject of party-based employment to the hands of the voters and their elected representatives to be decided at the state and local level.

For all of the above reasons, the decision of the Seventh Circuit Court of Appeals and the District Court for the Northern District of Illinois both of which rejected Petitioners' First Amendment claims, should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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26 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

I. THE ASSERTED GOVERNMENTAL INTERESTS DO NOT JUSTIFY TERMINATING BUSINESS WITH PETITIONER BECAUSE OF HIS POLITICAL ASSOCIATION. 1

A. Protecting Petitioners' Right of Political Association and Speech Will Not Impair Effective And Efficient Government Services. 2

1. A flood of unwarranted litigation is not likely. 2

2. Government efficiency does not require that all contractors be of the same political affiliation. 5

B. The Interest In The Democratic Process..... 7

II. RESPONDENTS' RETALIATORY POLICY VIOLATES RIGHTS OF POLITICAL AFFILIATION UNDER ANY STANDARD OF CONSTITUTIONAL REVIEW. 8

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR THE RECONSIDERATION OF *RUTAN*, OR *ELROD* AND *BRANTI*, AND THE DOCTRINE OF *STARE DECISIS* COUNSELS STRONGLY AGAINST THEIR REEVALUATION. 14

CONCLUSION.....20

TABLE OF AUTHORITIES

PAGE

Abercrombie v. City of Catoosa, 896 F.2d 1228 (10th Cir. 1990) 3

Akers v. Caperton, 998 F.2d 220 (4th Cir. 1993) 18

Allied-Bruce Terminix Companies, Inc. v. Dobson, __ U.S. __, 115 S. Ct. 834 (1995) 19

Arizona v. Rumsey, 467 U.S. 203 (1984) 16

Branti v. Finkel, 445 U.S. 507 (1980) 3, 5, 6, 7, 9, 14, 15, 17, 19

Brown v. Bd. of Educ. II, 349 U.S. 294 (1955) 19

Buckley v. Valeo, 424 U.S. 1 (1976) 8, 11

California v. Acevedo, 500 U.S. 565 (1991) 15

Caraballo v. Hernandez, 744 F. Supp. 389 (D.P.R. 1990) 3-4

Connick v. Meyers, 461 U.S. 138 (1983) 8

Cusson-Cobb v. O'Lessker, 953 F.2d 1079 (7th Cir. 1992) 4

Elrod v. Burns, 427 U.S. 347 (1976) 2, 3, 6-7, 8, 9, 11, 14, 15, 16, 17, 19

Figueroa v. Aponte-Roque, 864 F.2d 947 (1st Cir. 1989) 3

Florida Department of Health and Rehab. Services v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981) 19

Garrett v. Barnes, 961 F.2d 629 (7th Cir. 1992) 4

Gonzalez v. Soto-Rios, No. 93-1557 (D.P.R. July 7, 1995), 1995 U.S. Dist. LEXIS 10365 3

Gooden v. Neal 17 F.3d 925 (7th Cir), *cert. denied* __ U.S. __ 115 S.Ct. 73 (1994) 4

Helm v. Board of Trustees, 1994 U.S. Dist. LEXIS 15247, No. 92 C 5118 (N.D. Ill. October 26, 1994) ... 17

Hilton v. South Carolina Railways Com'n, 502 U.S. 197, 112 S.Ct. 560, 563 (1991) 16

Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973) 7

Kelly v. Municipal Court of Marion County, 852 F. Supp. 724 (S.D. Ind. 1994) 17

Kentucky v. Stincer, 482 U.S. 730 (1987) 15

Lebron v. National Railway Passenger Corp., ___ U.S. ___, 115 S.Ct. 961 (1995) 15

Mt. Healthy School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 (1977) 4, 5

Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701 (1st Cir. 1993) 17

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 16

Pickering v. Bd. of Educ., 391 U.S. 563 (1968) 8, 12, 13, 14

Planned Parenthood of Southeastern Penn. v. Casey, ___ U.S. ___, 112 S.Ct. 2791 (1992) 17, 18

Poe v. Ullman, 367 U.S. 497 (1961) 17

Rutan v. Republican Party, 497 U.S. 62 (1990) 2, 3, 7, 9, 11, 12, 14, 15, 16, 17, 19

Selch v. Letts, 5 F.3d 1040 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994) 18

Singleton v. Wulff, 428 US 106 (1976) 16

Stough v. Gallagher, 967 F.2d 1523 (11th Cir. 1992), *rehearing denied*, 978 F.2d 718 (11th Cir. 1992) 18

Turner Broadcasting System Inc v. F.C.C., 512 U.S. __, 114 S. Ct. 2445 (1994) 12

United States v. National Treasury Employees Union, __ U.S. __, 115 S. Ct. 1003 (1995) 12, 13, 14

Umbehr v. McClure, 44 F.3d 876 (10th Cir. 1995) (No. 94-1654, argued November 28, 1995, *sub nom. Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*) 3

United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) 8, 9, 11, 12, 14

United States Civil Service Comm'n v. National Association of Letter Carriers, 413 U.S. 548 (1973) 9, 10, 11

United States v. O'Brien, 391 U.S. 367 (1968) 11

Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992) 18

Vezzetti v. Pellegrini, 22 F.3d 483 (2d Cir. 1994) 18

Waters v. Churchill, __ U.S. __, 114 S. Ct. 1878 (1994) ..... 12.

Yee v. City of Escondido, ___ U.S. ___, 112 S.Ct. 1522 (1992) 15

Other Authorities

Sup. Ct. R. 14.1 14

Sup. Ct. R. 24.2 3

ARGUMENT

I. THE ASSERTED GOVERNMENTAL INTERESTS DO NOT JUSTIFY TERMINATING BUSINESS WITH PETITIONER BECAUSE OF HIS POLITICAL ASSOCIATION.

This case involves governmental abuse of cherished individual freedoms -- participation in the political process through the exercise of rights of association and speech. The City of Northlake's policy of political retaliation, whether denominated as "patronage" or not, destroys the individual's standing as a citizen, insults personal dignity and diminishes self-worth. The policy requires City vendors to kneel before the sovereign, to make financial tribute to the Mayor, and to refrain from speaking in opposition to the Mayor's continued rule. It thus results in forced contribution, forced association, and the suppression of opposing views. Northlake penalizes those who, like Petitioners, refuse to compromise their conscience, values and beliefs, by summarily taking away their livelihoods.

Respondents offer two reasons to justify the retribution which the City has inflicted upon Petitioners for adhering to their beliefs. First, the threat of unwarranted litigation will impair the effectiveness and efficiency of government, including both executive and judicial functions. Resp. Br. 12, 14-15. Second, Respondents also assert that all contractors must be politically loyal to assure efficient government, Resp. Br. at 13, 18-21, a requirement more traditionally asserted as serving an interest in representative government. *See Elrod v.*

Burns, 427 U.S. 347, 367 (1976); *Rutan v. Republican Party*, 497 U.S. 62, 70 (1990).[1] Neither claim justifies the wholesale evisceration of the associational rights of independent contractors.

A. Protecting Petitioners' Right of Political Association and Speech Will Not Impair Effective And Efficient Government Services.

Petitioners recognize that government has a valid interest in ensuring that contractors perform their services in a manner which is effective and efficient. Pet. Br. at 33-35. This interest is not threatened by allowing Petitioners to maintain the integrity of their political beliefs.

1. A flood of unwarranted litigation is not likely.

Respondents first suggest that recognizing the rights of contractors will impair government services by subjecting government to frivolous suits by every unsuccessful bidder. Resp. Br. at 12. The short answer is that there is no empirical support for this assertion.[2] In 1990, the Tenth Circuit held

[1] Illinois Officials also argue that it is difficult to identify the "political affiliation" of a contractor because such an entity may be comprised of multiple individuals. Illinois Officials Br. at 28. If that were true, then the patronage contracting that *amicus* suggests has existed for 200 years would long ago have died due to the inability to select the right contractors to reward or penalize. In any event, the political affiliation of small owner-operated businesses like O'Hare Truck Service, Inc. is easily identified.

[2] This case does not involve "bidders" for future public contracts, but rather the *termination* of an existing commercial relationship. Petitioners so phrased the question presented for review. Pet. Br. at i; *see also* Order granting Writ of Certiorari. Respondents were not "dissatisfied" with Petitioners' statement of the question and did not offer a different one. *Cf.* Supreme Court Rule 24.2. At other places in their brief Respondents also expressly recognize that the issue here is *termination* of a commercial relationship with government. *See* Resp. Br. at 5. Prospective commercial relationships present a different case.

that the First Amendment protects an independent contractor from retaliation against him on the basis of his political associations. *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1233 (10th Cir. 1990). The six years since that decision evince not a single reported case in the courts of the Tenth Circuit by an independent contractor alleging retaliation for political association rights. In fact, the only case regarding the First Amendment rights of independent contractors in the Tenth Circuit in the last six years is the free speech case, *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995) (No. 94-1654, argued November 28, 1995, *sub nom. Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*).[3]

[3] In arguing that judicial efficiency and effectiveness will be impaired, Respondents contend that *Umbehr*, by recognizing First Amendment rights of contractors, is unworkable and will lead to a never-ending string of lawsuits. Resp. Br. at 14. However, many circuits have protected free speech rights of independent contractors for some period of time without any indication that the courts are overwhelmed or have difficulty applying a free speech standard. See Pet. Br. at 24.

Respondents further argue that recognizing contractors' First Amendment rights would produce a flood of litigation regarding part-time and temporary government employees. Resp. Br. at 14. They state that Petitioners have argued that such employees are entitled to bring First Amendment claims under *Elrod*, *Branti* and *Rutan*. Petitioners have not argued here for the rights of public employees of any status but rather, have suggested that patronage contracting raises issues distinct from patronage employment and that these issues have yet to be addressed fully by the courts. See Pet. Br. at 37-41. However, it should be noted that in more than seven years since the First Circuit definitively held that transitory or part-time employees are protected from politically motivated firings or non-renewals, *see Figueroa v. Aponte-Roque*, 864 F.2d 947, 951 (1st Cir. 1989), Petitioners could identify only two patronage cases filed by such employees in that circuit, *Gonzalez v. Soto-Rios*, No. 93-1557 (D.P.R. July 7, 1995), 1995 U.S. Dist. LEXIS 10365 and *Caraballo v. Hernandez*,

This dearth of reported cases is not happenstance. To prevail in such litigation, the bidder would have to meet the substantial burden of proof prescribed in *Mt. Healthy School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). *See also Cusson-Cobb v. O'Lessker*, 953 F.2d 1079 (7th Cir. 1992); *Gooden v. Neal*, 17 F.3d 925 (7th Cir), *cert. denied*, __ U.S. __, 115 S.Ct. 73 (1994). *Mt. Healthy* would require disappointed bidders to prove that their political association and speech was a substantial motivating factor in the governmental defendant's decision to deny them a contract. Assuming that such a showing could be made, and that itself has proven difficult, *see, e.g., Garrett v. Barnes*, 961 F.2d 629 (7th Cir. 1992), the governmental defendant then could establish as a defense that, even in the absence of this associational conduct, it still would have denied the bidder a contract. *Mt. Healthy*, 429 U.S. at 287. Thus, not only would disappointed bidders have to show they were well-qualified and responsible for the job, but in addition, there was no other permissible reason why they were denied the contract. *Id.*[4] If there are a significant number of cases where this burden can be met, that does not suggest a flaw in the legal rule, but rather

744 F. Supp. 389 (D.P.R. 1990).

[4] Respondents further hypothesize that unwarranted litigation will extend beyond unsuccessful bidders to existing government contractors who lose renewal due to lower bidders or who are replaced by a new administration elected on a mandate requiring replacement of contractors because of the voters' perception of poor services. Resp. Br. at 12. On these facts neither case would survive *Mt. Healthy* requirements and prudent counsel would not, without additional favorable facts, advise filing suit.

reveals a widespread abuse of power by government officials.[5]

2. Government efficiency does not require that all contractors be of the same political affiliation.

Rather than argue a need for political loyalty based on the particular function or service provided by a given contractor, Respondents make the blanket argument that *all* government contractors should be subject to termination based on their political affiliation. Resp. Br. at 13, 18-20. They assert that all contractors perform their services without government supervisors to monitor their work and therefore are like *Branti*-exempt staff for whom political affiliation is an appropriate

[5] Contrary to *amicus* Illinois Officials' claim, their own experience shows that this Court's employment patronage decisions present no significant litigation burden to the State of Illinois. With 73,000 employees, and thousands of employment decisions since 1990, the 21 patronage suits filed in the six years since *Rutan* indicate no problem of any sort. In response to Petitioners' request, *amicus'* counsel provided information on 21 cases (as opposed to the 18 referred to in their brief), refusing, however, to provide agreements in the settled cases. That information, along with information from plaintiff's counsel in those cases, shows the following dispositions of the First Amendment claims. 1) None of the cases involves an issue of whether the position is exempt under *Branti*. 2) Nine of the cases, more than 40% of the total number filed, settled (one is yet to be formalized). In each of the five settled cases on which Petitioners could obtain information from plaintiff's counsel, the plaintiffs received the employment position in controversy. 3) The state won six cases by summary judgment: the *Mt. Healthy* requirements were applied; insufficient proof of motivation was found in five cases; motivation was not reached in one case due to a sufficient defense of alternative permissible justification (pending on appeal). 4) The State lost one case for declaratory relief (pending on appeal). 5) Three of the cases are pending in the district court. 6) Two cases were voluntarily dismissed. Also, about half of the cases appear to involve systemic problems in promotion in two specific positions: six of the cases involve promotions to lieutenants in the Department of Corrections; four of the cases involve promotion to stationary engineer at three different agencies.

requirement. *Id.* at 18-20. Respondents also argue, without further explanation, that contractors control the manner and method of performance and that therefore the government must retain some method of control "without having to wait for a disruption" of service. *Id.* at 13. These arguments disregard contract law, pervert the true interests of independent contractors and distort the holding of *Branti*.

First, Respondents and other governmental bodies can and do include in their contracts any performance requirements, including manner and method of performance, that they deem necessary or appropriate. To the extent that government wishes to embody such specific terms into a contract, it is free to do so. Second, independent contractors are dependent on their reputation in the field in which they work. It is contrary to common sense to believe they, as a class, are likely to provide poor services intentionally. Resp. Br. at 20. Finally, this Court has appropriately ruled that not all government supervisory staff are exempted from constitutional protection of association and belief under the *Branti* exception. *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Indeed, towing abandoned cars upon request by government personnel, the service which Petitioners provide, does not remotely require consideration of the factors defining positions exempt under *Branti*. See Pet. Br. at 36.[6]

[6] This Court need not address the issue of contractors who perform services where party affiliation is an appropriate requirement. In the context of public employment the government has the burden to show the need for political loyalty as a matter ". . . of proof, or at least argument directed at particular kinds of jobs." *Elrod*, 427 U.S. at 368 (plurality) (quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 574 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973)). Based on the lack of justification provided by Respondents, this Court may grant relief to Petitioners by holding that whatever the government interest may be in retaining politically affiliated contractors, that interest does not implicate the Petitioner's towing service operation.

B. The Interest In The Democratic Process.

In seeking to justify terminating a government contractor based on political affiliation, the interests Respondents expressly state are less telling than those which they have chosen to omit. While Respondents make a few passing references to the history and tradition of patronage, nowhere do Respondents (or their supporting *Amicus*) argue that the democratic process actually is served by Mayor Paxson requiring contributions to his campaign as a condition of Petitioners' continued receipt of the benefits of City-related business. *See Rutan v. Republican Party*, 497 U.S. at 92 (Scalia, J. dissenting); *Branti*, 445 U.S. at 522 (Powell, J. dissenting).

As Petitioners stressed in their opening brief, the interests associated with employment patronage as preserving the democratic process are even less likely to be served by contract patronage. Pet. Br. at 37-41. The Illinois Officials only reinforce the validity of this point. Illinois Officials Br. at 15-16. They cite the recent campaigns of Steve Forbes and Ross Perot as confirming the *Rutan* dissenting view that limits on patronage will lead to replacing older methods of campaigning with media and money intensive-techniques to the detriment of the political system. Whatever one's views may be on the impact on the political process of these particular

campaigns, contract patronage increases the use of these newer campaign techniques because it generates only money, not political participation by the citizenry. Thus, Respondents have failed to support a requirement of political loyalty, whether asserted to serve the interest of efficiency or the interest of representative government. *Elrod*, 427 U.S. at 367.

II. RESPONDENTS' RETALIATORY POLICY VIOLATES RIGHTS OF POLITICAL AFFILIATION UNDER ANY STANDARD OF CONSTITUTIONAL REVIEW.

Respondents argue that the proper standard to be applied in determining whether political affiliation can be required generally for municipal contractors is a standard of reasonableness, as used in *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). Resp. Br. at 15. They further argue, borrowing from public employee speech cases such as *Pickering v. Bd. of Educ.*, 391 U.S. 562 (1968), and *Connick v. Meyers*, 461 U.S. 138 (1983), that "a wide degree of deference" be given the City's judgment. Resp. Br. at 15.

All contractors, simply because they do business with government, are not the equivalent of government employees. Thus, the starting point of any analysis should be the assumption that contractors are no different from the general citizenry, whose political speech and associational activities have the highest protection; therefore, government efforts to abridge these rights must be subject to strict scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976). Consequently, Petitioners do

not seek to be treated as if they were public employees, looking only to *Elrod, Branti* and *Rutan* for protection. The rights to choose one's own political affiliations, to be free from compelled association and support, and to be free from viewpoint suppression are rights that this Court consistently has reaffirmed in cases arising outside of the employment context, both before and after the *Elrod, Branti* and *Rutan* decisions. Petitioners' rights are rooted in that larger body of precedent. See Pet. Br. at 9-21.

Even assuming, however, that this Court's public employee decisions do provide the appropriate framework to judge this restraint on the political affiliation of non-employees, it does not automatically follow that a mere test of "reasonableness" under *Mitchell* is the touchstone. Commitment to, and association to advance, political belief takes various forms, from simply joining a political party, to making campaign contributions, to pure speech itself, like displaying signs on one's private property. When these fundamental rights are at stake, this Court has applied heightened scrutiny. *Elrod*, 427 U.S. at 362.

Contrary to Respondents' reliance on them, this Court's decisions upholding the Hatch Act do not support some less stringent test for contract patronage. The Hatch Act, with its implementing Civil Service Commission regulations, left federal employees free to express opinions privately and publicly on political subjects and candidates, and to make financial contributions to political parties and organizations. *United States Civil Service Commission v. National Association of*

Letter Carriers, 413 U.S. 548, 576 n. 21 (1973). In fact, the Act's regulations explicitly allowed all of the speech and associational activities in which Petitioners engaged here. *Id.* (citing 5 C.F.R. § 733.111 (a)(2) (expressing opinions privately and publicly); (a)(3) (displaying pictures, badges); (a)(5) (being a member of a political party); (a)(8) (making financial contributions); (a)(10) (taking an active part in a nonpartisan election)).

Moreover, in contrast to contract patronage, the Hatch Act is neutral.

> [Its] restrictions . . . on federal employees are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described. They discriminate against no racial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls.

Letter Carriers, 413 U.S. at 564. The contract patronage practices implicated here are neither neutral, nor equally applicable to all partisan activities. They are directed at non-supporters of the incumbent only -- others are free to politic without penalty. They are aimed at a specific point of view and clearly seek to control political opinion.

The Hatch Act also is distinct from contract patronage in its underlying government interests. The Act advanced not only operational efficiency but also public employees' First Amendment rights by making sure that they were free from coercion to support or vote for the party in power. *Letter*

Carriers, 413 U.S. at 566.[7] In contrast, Northlake's associational restraints could never be characterized as protecting the political independence of contractors. *Mitchell* and *Letter Carriers* involved associational restraints so limited in comparison to Northlake's requirement of total fealty, as well as interests motivated by beneficent purposes beyond "operational efficiency," that these cases support rather than negate the appropriateness of using strict scrutiny here.

In *Elrod*, this Court rejected a request to use the less rigorous test of *United States v. O'Brien*, 391 U.S. 367 (1968), identifying the aspects of patronage justifying strict scrutiny review. Those observations about employee patronage are equally relevant to rejecting a test of "reasonableness" for contract patronage. First, patronage practices seek to control "association and belief *per se*." *Elrod*, 427 U.S. at 363 n.17. Patronage also involves "'suppressing communication.'" *Id.* (quoting *Buckley*, 424 U.S. at 17). Finally, patronage practices "focus on the ideas expressed by the persons or groups subjected to" them. *Elrod*, 427 U.S. at 363 n. 17 (quoting *Buckley*, 424 U.S. at 17).

Contract patronage is no different. Therefore, even if the public employment cases are the proper framework in which to consider Petitioners' claim, the heightened test of *Elrod*,

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[7] Petitioners discuss, *infra*, Northlake's asserted interest in contract patronage, which is simply operational efficiency. In *Elrod*, this Court considered and rejected additional interests posited in favor of employment patronage as interests of partisan organizations, not of government. "Only the latter will suffice." *Elrod*, 427 U.S. at 362. *See also Rutan*, 497 U.S. at 73 n. 4.

not the reasonableness test of *Mitchell* must be used. Such strict scrutiny is required because contract patronage is a partisan-motivated and enforced, viewpoint based, blanket restriction on political association and related speech.

However, even if a reasonableness test drawn from *Mitchell* and the employee speech cases were applied to this non-employee political affiliation case, government's interests are insufficient to justify this wholesale denial of First Amendment freedoms. A *Pickering* balance must be made, case-by-case. *Pickering*, 391 U.S. at 570. *See U.S. v. National Treasury Employees Union*, __ U.S. __, 115 S. Ct. 1003, 1020 (1995)(O'Connor, J., concurring). *See also Waters v. Churchill*, __ U.S. __, 114 S. Ct. 1878, 1887 (1994) (plurality) (warning that in the context of employer regulations of employee work-site speech, some circumstances will require "a more substantial showing that the speech is, in fact, likely to be disruptive").

In justifying its broad restraint on the basis of "anticipated harms," Northlake "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *National Treasury*, 115 S. Ct. at 1017, quoting *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. __, 114 S. Ct. 2445, 2470 (1994). As Justice O'Connor warned in her concurrence in *National Treasury*, "the bare assertion of a laudable purpose" will not justify "wide-ranging intrusions on First Amendment liberties." *National Treasury*, 115 S. Ct. at 1021 (O'Connor, J., concurring).

Here, Respondents define their interest only as a speculative threat to operational efficiency. Resp. Br. at 17, 19-20. But far from making any showing of real harm as *National Treasury* would require, the City relies on a "bare assertion" that patronage practices are necessary for efficient control of public services. For 30 years, notwithstanding his political affiliation, John Gratzianna and O'Hare Truck Services performed competently in every respect. The City thus has completely failed to assert any "necessary impact on the actual operation of government" caused by contractors' affiliation that a *Pickering* balance requires. *National Treasury*, 115 S.Ct. at 1014, quoting *Pickering*, 391 U.S. at 571.

Just as this Court in *National Treasury* rejected government's interest in preventing actual and perceived corruption because its ban on honoraria for non-work-related speech was unsupported by a showing of harm, Respondents' interest here is too attenuated to support its restraint on Petitioners' nongovernmental-worksite associational activities. Accordingly, Respondents' interest in contact patronage cannot be said to be weighty.

Against this insubstantial interest must be weighed the "breadth and intrusiveness" of its punitive action. *National Treasury*, 115 S. Ct. at 1020 (O'Connor, J., concurring). This side of the balance weighs not just contractors' own interests in being able to manifest political beliefs with financial contributions and candidate affiliation, but also those with whom contractors would associate for political purposes as well as the candidates who would receive and use those contribu-

tions. *See National Treasury*, 115 S.Ct. at 1015 (considering the "significant burden on the public's right to read and hear what [government] employees would otherwise have written and said"). Obviously, these First Amendment interests far outweigh Northlake's assertions of interest and must prevail in this *Pickering* balance.

Accordingly, if a lower-tier standard of review drawn from *Mitchell* and the public employee speech cases were applied to this political association case, the balance is decidedly in Petitioners' favor. Northlake's "bare assertions" of need for control to enhance efficiency are not sufficiently substantial to support wholesale contract patronage.

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR THE RECONSIDERATION OF *RUTAN*, OR *ELROD* AND *BRANTI*, AND THE DOCTRINE OF *STARE DECISIS* COUNSELS STRONGLY AGAINST THEIR REEVALUATION.

Both Respondents and *Amicus* Illinois Officials urge the Court to use this case to overturn *Rutan*, and *Elrod* and *Branti* as well. Respondents' request, which was not presented for consideration to the courts below nor included in the question on which certiorari was granted, should be denied. Not only is this case factually distinct from the employee patronage cases but reconsidering these cases here also would result in adjudicating the rights of millions of individuals -- public employees -- who are not before the Court.

Respondents' belated effort to present a new question for argument in their brief on the merits disregards Rule 14.1(a).

See Yee v. City of Escondido, ___ U.S. ___, 112 S.Ct. 1522, 1532 (1992). It also attempts a litigation strategy disapproved by the Court. *See California v. Acevedo*, 500 U.S. 565, 573 n. 2 (1991) (refusing to consider respondent's argument, not previously raised in Brief in Opposition or in any cross-petition).

Respondents cannot evade this rule by arguing that the new question was "fairly included" within the question on which certiorari was granted. The First Amendment rights that Petitioners claim exist independent of the employee patronage issues raised in *Elrod, Branti* and *Rutan*. Pet. Br. at 9-21. Further, the employment decisions at issue in *Rutan* -- hiring, promotions, transfers and recall -- present no factual parallel to Respondents' *termination* of Petitioners' commercial relationship. *Cf. Lebron v. National Railway Passenger Corp.*, ___ U.S. ___, 115 S.Ct. 961 (1995)(question "fairly included" within certiorari question when it was ruled on by the lower courts and when, given the facts plead by petitioner, it was "prior question" necessarily reached in order to consider the question explicitly presented). Finally, Respondents have not even attempted to make the requisite showing that this is such an "exceptional case" that they should be permitted to raise new arguments that they failed to raise below. *See Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987) (claim of ineffective assistance of counsel as not meeting "exceptional case" requirement).

More importantly, this Court should not re-examine *Rutan* in a case where the persons whose interests are directly at

stake -- public employees -- are not before the Court. The Court long has cautioned that "[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton v. Wulff*, 428 US 106, 113 (1976). O'Hare Truck Service, an independent contractor, cannot, and does not purport to, represent the interests of any public employees. It would work a great unfairness to all present and prospective government employees to so substantially adjudicate their rights in a case where their interests are not represented.

The doctrine of *stare decisis*, of fundamental importance to the Court and the country, also counsels against re-examining *Rutan*. *See Hilton v. South Carolina Railways Com'n*, 502 U.S. 197, 112 S.Ct. 560, 563 (1991). Any departure from *stare decisis* "`demands special justification,'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)(*quoting Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)), which Respondents have not provided.

The Constitution requires, and this Court consistently has provided, paramount protection for the core First Amendment rights of political speech and association. Pet. Br. at 9-21. And, for the reasons set forth in the both the majority opinion and the concurrence of Justice Stevens, *Elrod* and its progeny are not unsound in principle. These cases, Petitioners contend, "fit[] comfortably within the framework of the Court's prior decisions, . . . the holdings of which are `not a series of isolated points,' but mark a `rational continuum.'"

Cf. Planned Parenthood of Southeastern Penn. v. Casey, __ U.S. __, 112 S.Ct. at 2811 (1992) (*quoting Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

Empirically, there is no support for the Respondents' and *amicus'* further argument that these cases should be overruled because lower courts or public officials are confused. A large majority of cases raising *Elrod-Branti-Rutan* claims are easily disposed of prior to trial, either through settlement or motions to dismiss or summary judgment.[8]

Where cases are not so resolved, the issue precluding summary disposition in most cases is not, contrary to *Amicus'* contention, judicial uncertainty about whether the plaintiff seeks or occupies an employment position for which political affiliation is not an appropriate requirement. (Illinois Officials Br. at 20-21.) Rather, the material issue of unresolved fact commonly involves whether the adverse action taken against the employee was politically motivated.[9]

The purportedly inconsistent rulings complained of by *amicus*, Illinois Officials Br. at 20 n. 5, reflect and respect the diversity of our federalism, including the fact that individuals who share similar job titles exercise widely disparate lev-

[8] From January 1, 1994 through March 11, 1996, there were 43 reported decisions on defendants' motions to dismiss or for summary judgment in cases challenging politically motivated employment actions on *Elrod, Branti* and/or *Rutan* grounds. Of those decisions, 32 granted the dispositive motion. See also analysis of the Illinois Officials' litigation *supra* at 5 n.5.

[9] *See Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 706 (1st Cir. 1993); *Helm v. Board of Trustees*, 1994 U.S. Dist. LEXIS 15247, No. 92 C 5118 (N.D. Ill. October 26, 1994) (same); *Kelly v. Municipal Court of Marion County*, 852 F. Supp. 724, 729 (S.D. Ind. 1994) (same).

els of responsibility depending upon the state or locality in which they are employed.[10] Such fact-specific assessment of various practices claimed to restrict fundamental First Amendment rights, including those claimed here by independent contractors, fall well within the appropriate judicial role. *Cf. Casey*, 112 S. Ct. at 2809.

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[10] Thus, the fact that the Fourth Circuit held that a West Virginia highway superintendent was protected from politically motivated discharge, when he or she is seven rungs below the Governor on the organization chart, and has virtually no discretion regarding the operation of his or her office, *see Akers v. Caperton*, 998 F.2d 220, 225 (4th Cir. 1993), is not inconsistent with a finding that a New York highway superintendent is not protected from politically motivated discharge when that superintendent is responsible for approximately one-sixth of the town's budget, has sixty employees reporting to him, develops public relations campaigns for his department and frequently makes public speeches on behalf of his department. *See Vezzetti v. Pellegrini*, 22 F.3d 483, 486 (2d Cir. 1994). *Cf. Selch v. Letts*, 5 F.3d 1040, 1047 (7th Cir. 1993) (highway superintendent developed plans, guidelines and policies to supervise contractors, managed more than sixty employees with a budget of over $1 million and "could decide where and when [maintenance] work was to be completed"), *cert. denied*, 114 S. Ct. 1189 (1994).

The alleged inconsistency in rulings regarding deputy sheriffs is similarly a function of different factual situations, not judicial confusion or uncertainty. In *Stough v. Gallagher*, 967 F.2d 1523, 1529 (11th Cir. 1992), *rehearing denied*, 978 F.2d 718 (11th Cir. 1992), where the court held that political affiliation was not an appropriate consideration, the sheriff had implemented guidelines stating that personal political loyalty was not a prerequisite for deputy sheriffs and the sheriff made no allegation that the plaintiff's statements did or could disrupt the office. In contrast, in *Upton v. Thompson*, 930 F.2d 1209, 1216 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992), the plaintiff was the chief deputy in a very small department, was the brother of the outgoing sheriff (whom the incoming sheriff had been very critical of in the election), and had actively led a group of employees against the new sheriff. The *Upton* court also explained that part of the inconsistency between jurisdictions on this issue is based on variations in the applicability of local civil service provisions.

Neither Respondents nor *Amicus* identify any changed circumstances sufficient to justify overruling this Court's public employment patronage cases. The arguments they raise were considered by and rejected by this Court in *Elrod*, and then again in *Branti* and *Rutan*. *See Rutan*, 497 U.S. at 82-92 (Stevens, J. concurring). As this Court has admonished before, "[i]t should go without saying that the vitality of . . . constitutional principles . . . cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Education II*, 349 U.S. 294, 300 (1955). *Cf. Allied-Bruce Terminix Companies, Inc. v. Dobson*, __ U.S. __, 115 S. Ct. 834, 838-39 (1995).

Finally, it must be noted that "[t]he Constitution serves human values." *Casey*, 112 S.Ct. at 2809. Although the classic reliance case arose in the commercial context, this factor also is critical in cases implicating fundamental rights. *Id.* In response to *Elrod*, state and local governments have instituted apolitical employment systems; thus, public employees over two decades have come to rely upon these classifications and the protection the First Amendment affords their rights. Overruling *Elrod, Branti* and *Rutan* would produce massive upheavals in the public workplace and leave public employees and other citizens wondering whether the rules on which they rely in ordering their affairs are "rules of law" or "merely the opinions of [those] who temporarily occupy high office." *See Florida Department of Health and Rehab. Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981)(Stevens, J., concurring).

CONCLUSION

For these reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed. The case should be remanded to the United States District Court for the Northern District of Illinois.

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No. 95-191

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC.
AND JOHN A. GRATZIANNA,
Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON,
AND POLICE CHIEF SEYMOUR SAPOZNIK,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF TOWING & RECOVERY ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF AMICUS CURIAE	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
DENYING INDEPENDENT CONTRACTORS THEIR RIGHTS OF SPEECH AND POLITICAL ASSOCIATION HAS AS MUCH OF A CHILLING EFFECT ON THE FIRST AMENDMENT AS WHEN THOSE RIGHTS ARE DENIED TO GOVERNMENT EMPLOYEES	6
A. The Broad Categorical Distinctions Applied By The Seventh Circuit To Deny Petitioners Relief Ignore The Applicable Facts In This Case As Well As The Foreseeable And Direct Consequences Of Political Retaliation To Petitioners And Other Independent Contractors	8
B. The Harm Which The Seventh Circuit Perceives Will Occur To Government By Extending *Elrod* In This Case Does Not Justify Denying Petitioners Their First Amendment Rights	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
Branti v. Finkel, 445 U.S. 507 (1980)	10
Bridges v. California, 314 U.S. 252 (1941)	7
Buckley v. Valeo, 424 U.S. 1 (1976)	7
Downtown Auto Parks, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005 (1991)	5, 7
Elrod v. Burns, 427 U.S. 347 (1976)	6, 7, 10, 11, 12
Horn v. Kean, 796 F.2d 668 (3rd Cir. 1986)	9, 10, 11
LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984)	7, 8, 9, 10
NAACP v. Button, 371 U.S. 415 (1963)	7
New York Times Co. v. Sullivan, 376 U.S. 254 (1963)	7
O'Hare Truck Service, Inc. v. City of Northlake, 47 F.3d 883 (7th Cir. 1995)	5, 7, 8, 10, 11
Perry v. Sindermann, 408 U.S. 593 (1972)	6
Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990)	5, 10
Speiser v. Randall, 357 U.S. 513 (1958)	6
Umbehr v. McClure, 44 F.3d 876 (10th Cir. 1995), *cert. granted sub nom. Heiser v. Umbehr*, —— U.S. ——, 115 S. Ct. 2616 (*cert. granted* June 29, 1995) (No. 94-1654)	10

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BRIEF OF TOWING & RECOVERY ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.3 of the Rules of this Court, and with the accompanying written consents of the parties, Towing & Recovery Association of America, Inc. ("TRAA") submits this brief as amicus curiae in support of petitioners, and urges the Court to reverse the decision of the Seventh Circuit.

THE INTERESTS OF AMICUS CURIAE

TRAA is the national association of companies engaged in the towing and recovery * of motor vehicles.

* As used by the towing and recovery industry, "recovery" operations involve the relocation of a disabled vehicle in order that it

TRAA is a federation of fifty state towing and recovery associations and the towing and recovery association of the District of Columbia. Together with its fifty-one affiliated associations, TRAA currently represents more than 5000 towing and recovery companies nationwide.

Towing and recovery companies play a vital, but nonetheless frequently overlooked, role in facilitating the safe, continuous, and unobstructed movement of the public and commerce on the Nation's streets and highways. Daily these companies engage in the towing and recovery of virtually every type of motor vehicle that may be disabled, abandoned and/or illegally parked. This includes automobiles, buses, trucks of every weight and size, and heavy construction equipment.

In general, towing and recovery services consist of two types, "*private*" and "*public*." A private tow occurs when the owner of the vehicle contacts the towing company directly and arranges for the service. A public tow occurs when the service is arranged for by the applicable state or local government, even though the vehicle may be privately owned; *e.g.*, the towing of several personal vehicles involved in an accident. TRAA estimates that more than seventy-five percent of all towing and recovery companies perform public towing and recovery services for or on behalf of a state and/or local government, and that public towing generates somewhere between thirty and sixty percent of the revenues of these companies.

In virtually every instance in which public tows are provided by towing companies they are performed by the companies as independent contractors. The selection of a particular company to perform public towing and recovery services ordinarily results from either a state or local government's use of a sequential "rotation" or "call" list (as in the case now before the Court), the use of a competitive bid process, or both.

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can be towed or moved under its own power; for example, by righting an overturned tank truck, or by pulling a bus out of a ditch. Recovery operations typically require the use of specialized operator skills and equipment, including hydraulic booms and winches, cables, and dollies.

The purpose of using a rotation list is to provide the local or state law enforcement with an orderly process for distributing tows among towing companies. The list identifies the next-available company or companies to be contacted as the need for a specific towing and recovery service arises. While the specific criteria that are used for determining whether an individual company qualifies to be listed may vary among the various state and local governments, in general the criteria focus on the ability of individual companies to provide a safe and efficient service to the public. Typically, selection criteria will focus on towing and recovery skills and experience (*e.g.*, the skill and experience of a company to recover and tow an overturned tank truck laden with hazardous materials), the types of towing and recovery equipment a company has available, a company's financial responsibility, and if a company is going to be towing abandoned or illegally parked vehicles whether the company has secure facilities for storing vehicles. Qualifying companies for a public tow rotation list on the basis of performance-oriented criteria is especially essential since the vehicles to be towed and/or recovered are primarily privately-owned vehicles.

TRAA and its member companies have a vital interest in the issues and outcome of this case. The towing and recovery industry is the essence of small business. The typical company is family-owned and operates four vehicles. The cost of such vehicles requires a significant capital investment by such businesses. "Light-duty" vehicles used for towing and recovering automobiles and other small vehicles average $35,000 each, and have a useful life of no more than five years. The cost of a "heavy-duty" vehicle used for towing and recovering trucks, buses and other large vehicles ranges between

$175,000 and $225,000, depending on a vehicle's towing and lift capacity and the manner in which it is equipped, and have a useful life of no more than ten years. The owners of towing companies represent the hard-working dedication and independent spirit upon which this country was built. The issues presented here go to the heart and economic survival of this industry, as well as to the level of service and safety which the public has a right to expect whenever their privately-owned vehicles, or those of others, are subject to a public tow.

If the Court permits the decision below to stand, an immediate and generalized chilling effect on the exercise of free-speech and association by towing companies and other independent contractors nationwide will result. Indeed, affirmance of the decision below would further fuel the fires of an already fractious debate between the political parties, and the escalating disharmony and fragmentation and "get-evenness" that has been the result; that this would come at a time when all levels of government are looking increasingly to privatize their services by shifting work to independent contractors lends support for TRAA's concern.

STATEMENT OF THE CASE

Petitioners O'Hare Truck Service, Inc. (O'Hare) and its owner, John A. Gratzianna, brought this suit in the District Court following O'Hare's removal from the towing rotation list of Respondent City of Northlake. O'Hare had been on Northlake's rotation list and providing public towing services via the list since 1965. App. 22a, para. 10. Since at least 1965, it had been Northlake's policy and practice not to remove a company from the list unless there was cause, App. 22a, para. 8. In 1989, Respondent Paxson, Northlake's mayor, acknowledged the City's policy and advised Mr. Gratzianna that the policy would continue being applied as long as the quality of O'Hare's services was maintained. App. 22a, para. 10. Following his reelection in 1993, however, Mayor Paxson

directed Respondent Sapoznik, Northlake's police chief, to remove O'Hare from the City's rotation list. App. 23a, para. 14. O'Hare was removed from the list because Mr. Gratzianna refused to contribute to Mayor Paxson's reelection campaign and publicly supported his opponent. App. 23a, para. 12, 13.

Petitioners then filed this action in the District Court for the Northern District of Illinois, alleging that Respondents had violated Petitioners' First and Fourteenth Amendment rights of political association and due process, by ceasing to do business with O'Hare in retaliation for Mr. Gratzianna's refusal to support Mayor Paxson's campaign and his support for the Mayor's opponent during the election. Relying principally upon the Seventh Circuit's decision in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991), the District Court dismissed Petitioners' suit as a matter of law.

On appeal, the Seventh Circuit affirmed the District Court's dismissal, rejecting Petitioners' request that the court reconsider its *Downtown Auto Parks* decision in light of the principles enunciated in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) and other decisions of this Court. *O'Hare Truck Service, Inc. v. City of Northlake*, 47 F.3d 883 (7th Cir. 1995).

SUMMARY OF ARGUMENT

The removal of Petitioners from the Respondents' merit based towing rotation list, solely and in direct retaliation for Petitioners' support for an opposition candidate, was a denial of Petitioners' rights of political speech and assembly. That Petitioners were providing towing services to, and on behalf of, Respondents in the capacity of independent contractors rather than as government employees should not serve to deny them of such basic and fundamental Constitutional rights, or to justify the penalty imposed on Petitioners for having exercised those rights.

The categorical distinctions used by the Seventh Circuit to differentiate between independent contractors, as an unprotected class of citizens, and government employees, who are protected, are overly broad and ignore the applicable facts of this case, as well as the foreseeable and direct consequences of political retaliation to Petitioners and other independent contractors.

The administrative burdens which the Seventh Circuit perceives would be imposed on Respondents were *Elrod* extended in this case can not serve to justify denying Petitioners their First Amendment rights.

ARGUMENT

DENYING INDEPENDENT CONTRACTORS THEIR RIGHTS OF SPEECH AND POLITICAL ASSOCIATION HAS AS MUCH OF A CHILLING EFFECT ON THE FIRST AMENDMENT AS WHEN THOSE RIGHTS ARE DENIED TO GOVERNMENT EMPLOYEES

As the Court recognized in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972):

> For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Such interference with constitutional rights is impermissible.

"For the First Amendment right to 'speak one's mind . . . on all public institutions' includes the right to engage in

'vigorous advocacy' no less than 'abstract discussion.' " *Buckley v. Valeo*, 424 U.S. 1, 48 (1976), citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, quoting *Bridges v. California*, 314 U.S. 252, 270 (1941), and *NAACP v. Button*, 371 U.S. 415, 429 (1963). These fundamental rights—linchpins of our democratic society—should not be permitted to end here or be further denied to a class of citizens no less deserving than those public employees for whom the scope of the First Amendment's protections has previously been recognized by this Court.

The issue TRAA wishes to address as *amicus* in this brief is what it perceives as fundamental problems in two of the three rationale cited by the Seventh Circuit in support "for [its] declining to extend *Elrod* [*v. Burns*, 427 U.S. 347 (1976) and its progeny] to independent contractors." *O'Hare*, 47 F.3d at 885. While underestimating the full extent to which patronage practices can and do restrain the rights of independent contractors, especially in the case of towing companies and many other small business entities, the Seventh Circuit also overstates the extent to which government would be adversely impacted if such rights were extended to towing companies and other independent contractors.

Citing to its earlier decisions in *Downtown Auto Parks, Inc.*, 938 F.2d 705 and *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), the Seventh Circuit's rejection of Petitioner's request for relief under the First Amendment is based upon three factors, two of which are relevant here: the "extent of the likely interference with an independent contractor's freedom to associate politically," *O'Hare*, 47 F.3d at 885, and the court's concern about "practical, administrative consequences of extending *Elrod's* protection," *id.*

A. The Broad Categorical Distinctions Applied By The Seventh Circuit To Deny Petitioners Relief Ignore The Applicable Facts In This Case As Well As The Foreseeable And Direct Consequences Of Political Retaliation To Petitioners And Other Independent Contractors.

In rejecting Petitioners' request for relief, the Seventh Circuit has summarily concluded that for any independent contractor, including Petitioners, "there [is] little chance that a contractor's freedom [is] impinged", *O'Hare*, 47 F.3d at 885, because of the government's threatened or actual denial of business in retaliation of a contractor's First Amendment exercise. The basis for this conclusion was discussed in detail in the Seventh Circuit's *LaFalce* decision, wherein the Seventh Circuit described its view of the marketplace in which independent contractors generally are perceived to operate:

> Although some business firms sell just to government, most government contractors do have private customers. If the contractor does not get the particular government contract on which he bids, because he is on the outs with the incumbent and the state does not have laws requiring the award of the contract to the low bidder (or the laws are not enforced), it is not the end of the world for him; there are other government entities to bid to, and private parties as well. *It is not like losing your job.* Of course, the contrast can be overstated; unless the government worker who loses his job cannot find another job anywhere, the loss will not be a total catastrophe. Nevertheless, many government workers could not find employment at the same wage in the private sector; and the prospect that a protracted period of search following discharge might well result in a substantially less well paid job would cause many government workers to flinch from taking ends adverse to their superiors. An independent contractor would tend *we imagine* to feel a somewhat lesser sense of dependency. [Emphasis added.]

712 F.2d at 294. The same rationale was applied by the Third Circuit in *Horn v. Kean*, 796 F.2d 668, 674-675 (3rd Cir. 1986).

While the foregoing analysis may accurately describe the situation for some independent contractors, it is far from the case for towing companies and many other independent contractors. First, unlike many industries serving both the public and private sectors, the demand for towing services is relatively inelastic and in any event largely out of the control of towing companies. The demand for towing services is precipitated by the occurrence of an accident or other disabling event not by the towing company. Thus there is little a towing company can do in the way of stimulating new demand for its services. Second, the vast majority of towing companies are highly dependent on local and state government for their business. Thus the loss of such business to individual companies can be devastating. More than seventy-five percent of all towing and recovery companies provide public towing and recovery services, and of these companies a significant portion of their gross revenues, TRAA estimates somewhere between thirty and sixty percent, are generated directly from services provided to or on behalf of government. In the instant case, a substantial part of the Petitioners' incomes are derived from fees resulting from public tows, App. 21a, para. 6. Thus, O'Hare's removal from Respondents' rotation list has caused Petitioners to lose substantial amounts of income, App. 23a, para. 15. Contrary to the Seventh Circuit's broad assumptions, however, O'Hare, like other typical towing companies, cannot easily replace lost government business, if at all, merely by looking to sell services to private customers. In effect, for a towing company to be barred or otherwise removed from a jurisdiction's rotation list solely in retaliation for the way in which one votes can be no different than losing one's job for the same reason. "Moreover, a discharged [government employee] can count on

unemployment benefits in the transition to a private sector job, while an independent contractor bears the entire risk of termination." *Horn v. Kean,* 796 F.2d at 681 n.1 (Gibbons, J. dissenting).

The Seventh Circuit's approach to the rights of independent contractors is arbitrary and simplistic, ascribing to independent contractors generally facts which may not apply. It is an approach which can easily lead to the same "inconsistent and unpredictable results" which Mr. Justice Scalia condemned in his dissent in *Rutan,* 497 U.S. at 110-113. For that reason, the Tenth Circuit in *Umbehr v. McClure,* 44 F.3d 876 (10th Cir. 1995) (the companion case, No. 94-1654, to *O'Hare*), has "reject[ed] any categorical distinctions based on whether independent contractors have more or less of an economic interest in their government contracts, both because such categorical distinctions are impossible to make and because, in this context, they are irrelevant." *Umbehr,* 44 F.3d at 883. As the Tenth Circuit correctly reasons:

> There is little justification for a rule that the magnitude of the loss determines whether an individual's First Amendment rights have been violated. As the dissenting opinion in *Horn* pointed out, "The [sic] constitutional wrong condemned in *Elrod* and *Branti* [*v. Finkel,* 445 U.S. 507 (1980)] was the state's attempt to control the beliefs and associations of its citizens. That control can be just as effective and offensive when the state reduces a citizen's income by twenty percent as when the state reduces the citizen's income by one hundred percent."

The Third Circuit's majority opinion in *Horn* (holding that the replacement of independent contractors following the election of the opposition party's gubernatorial candidate did not infringe First Amendment rights) is further persuasive in this regard. While following the Seventh Circuit's *LaFalce* rationale, the Third Circuit expressly noted that:

> In the case at bar, we are deciding only the matters before us. Thus, we do not meet the emotionally-charged scenario posed at oral argument: Whether the first amendment [sic] would protect from politically-motivated discharge an independent contractor with substantial economic dependence on the state, *e.g.,* a one-person shoe-shine in a public building.

Horn, 796 F.2d at 675 n.9.

In short, "[r]ights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Elrod,* 427 U.S. at 359 n.13. To sanction the Seventh Circuit's decision will serve to deny significant numbers of towing companies, as well as many other independent contractors, from freely exercising the most basic of rights guaranteed under the First Amendment—the rights of political association and political expression. Fearing retaliation should they support the wrong candidate, substantial numbers of companies would be forced either to forego voting or to vote for candidates they would otherwise not support, solely in order to maintain their economic viability. That towing companies are as dependent on public towing as they are makes this outcome a certainty.

B. The Harm Which The Seventh Circuit Perceives Will Occur To Government By Extending *Elrod* In This Case Does Not Justify Denying Petitioners Their First Amendment Rights.

In "declining to extend *Elrod* to independent contractors", *O'Hare,* 47 F.3d at 885, the Seventh Circuit expressed particular concern "that a decision upholding a First Amendment right to have one's *bid* considered without regard to political considerations would invite every disappointed *bidder* for a public contract to bring a federal suit against a government purchaser", *id.* (emphasis supplied).

In the case at bar, Petitioner O'Hare was not a "bidder for a public contract" but rather a job incumbent listed on, and providing public towing services from, the Respondent's rotation list; a list which, until Respondent Paxon's reelection in 1993, had long been recognized and understood as being a "merit based" apolitical list both by the Respondent City and by all of the companies on the list. O'Hare had been on Northlake's towing rotation list and providing public towing services through the list since 1965, App. 22a, para. 10; since at least 1965, it had been Northlake's policy and practice not to remove a company from the list unless there was cause, App. 22a, para. 8.

The historical application of Respondent's rotation list, as well as its fundamental purpose, TRAA would submit, was consistent with the two-fold purpose and manner in which rotation lists are used by communities throughout the country: (i) compiling a merit-based list of the towing companies available in that community, based solely on performance-oriented (as opposed to political) criteria; and (ii) providing an orderly system for distributing tows among the companies that have been listed. Although *Elrod's* extension in this case could potentially result in some additional litigation to the City, TRAA submits that this reason alone should not be elevated above fundamental rights which the First Amendment was designed to protect.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. THIS COURT'S DECISION IN *RUTAN* SHOULD BE OVERRULED BECAUSE IT IS UNSOUND IN PRINCIPLE, UNWORKABLE IN PRACTICE, AND HAS NOT ENGENDERED THE TYPE OF RELIANCE WHICH JUSTIFIES ADHERENCE TO THE DOCTRINE OF STARE DECISIS 7

A. *Rutan* Was Incorrectly Decided 11

1. The constitutional rule which underlies *Rutan* ignored 200 years of history and tradition 11

2. *Rutan* incorrectly balanced the competing interests at stake 13

3. Whether to consider political factors in public employment is a question for the people to decide through their elected representatives 16

B. The Constitutional Rule Which Underlies *Rutan* Has Proved Unworkable 19

C. *Rutan* Has Not Engendered Reliance So As To Justify Adherence to Stare Decisis 26

II. THE COURT SHOULD NOT EXTEND THE REACH OF *RUTAN* TO GOVERN THE AWARD OF PUBLIC CONTRACTS 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Abington Sch. District v. Schempp, 374 U.S. 203 (1963) 12

Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) 11, 26

Akers v. Caperton, 998 F.2d 220 (4th Cir. 1993) 20-21

Allied-Signal, Inc. v. Director, Division of Taxation, 504 U.S. 768 (1992) 11, 19

Brady v. Fort Bend County, 58 F.3d 173 (5th Cir. 1995) 20

Branti v. Finkel, 445 U.S. 507 (1980) . . . . . *passim*

Brown v. Glines, 444 U.S. 348 (1980) 14

Elrod v. Burns, 427 U.S. 347 (1976) . . . . . *passim*

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 19

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 9

Heiser v. Umbehr, No. 95-1654 (U.S.) 16

Helvering v. Hallock, 309 U.S. 106 (1940) 10-11

Hyland v. Wonder, 972 F.2d 1129 (9th Cir. 1992) 24

LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984) 21, 28-30

Lynch v. Donnelly, 465 U.S. 668 (1984) 12

Mapp v. Ohio, 367 U.S. 643 (1961) 5-6

McIntyre v. Ohio Elections Commission, 115 S. Ct. 1511 (1995) 10, 12

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 26

Mt. Healthy City Sch. District Board of Education v. Doyle, 429 U.S. 274 (1977) 22

Payne v. Tennessee, 501 U.S. 808 (1991) 26

Peek v. Jason, No. 94-3027 (C.D. Ill) 22

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 11, 19, 26

Rutan v. Republican Party, 497 U.S. 62 (1990) . . *passim*

Scott v. Illinois, 440 U.S. 367 (1979) 28

Selch v. Letts, 5 F.3d 1040 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994) 20-21

South Carolina v. United States, 199 U.S. 437 (1905) 12

Stough v. Gallagher, 967 F.2d 1523 (11th Cir. 1992) 20

Tarpley v. Jeffers, No. 93 CV 4092, Mem. & Ord. (S.D. Ill. Apr. 6, 1995), *appeal pending*, No. 95-2084 (7th Cir.) 23

United States v. Kokinda, 497 U.S. 720 (1990) 26

United States v. Nat'l Treasury Employees Union, 115 S. Ct. 1003 (1995) 14

Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, *Thulen v. Bausman*, 503 U.S. 906 (1992) 20

Vezzetti v. Pellegrini, 22 F.3d 483 (2nd Cir. 1994) 20-21

Vickery v. Jones, 856 F. Supp. 1313 (S.D. Ill. 1994), *appeal pending*, Nos. 96-1055 & 96-1163 (7th Cir.) 3-4, 21, 23

Vickery v. Jones, No. 93 CV 4030, Mem. & Ord. (S.D. Ill. Sept. 15, 1994), *appeal pending*, Nos. 96-1055 & 96-1163 (7th Cir.) 23-24

Vojvodich v. Lopez, 48 F.3d 879 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 169 (1995) 20

Waters v. Churchill, 114 S. Ct. 1878 (1994) 14

STATUTES

20 ILCS 415/8b.9 23

20 ILCS 415/1 *et seq.* 17-18, 26

30 ILCS 505/1 *et seq.* 4-5

42 U.S.C. § 1983 3

ALA. CODE § 36-26-1 *et seq.* 18

ALASKA STAT. § 39.25.010 *et seq.* 18

ARIZ. REV. STAT. ANN. § 41-761 *et seq.* 18

CAL. GOV. CODE § 18500 *et seq.* 18

COLO. REV. STAT. § 24-50-101 *et seq.* 18

CONN. GEN. STAT. § 5-193 *et seq.* 18

D.C. CODE ANN. § 1-601.1 *et seq.* 18

DEL. CODE ANN. tit. 29, § 5901 *et seq.* 18

FLA. STAT. ANN. § 110.201 *et seq.* 18

GA. CODE ANN. § 45-20-1 *et seq.* 18

HAW. REV. STAT. § 76-1 *et seq.* 18

IDAHO CODE § 67-5301 *et seq.* 18

ILL. ADMIN. CODE tit. 80 Ch. I, § 302.10 *et seq.* . . 26

ILL. ADMIN. CODE tit. 80 Ch. I, § 302.7903(a) 27

IND. CODE ANN. § 4-15-2-1 *et seq.* 18

IOWA CODE ANN. § 19A.1 *et seq.* 18

KAN. STAT. ANN. § 75-2925 *et seq.* 18

KY. REV. STAT. § 18A.005 *et seq.* 18

LA. REV. STAT. ANN. § 721 *et seq.* 18

ME. REV. STAT. ANN. tit. 5, § 7031 *et seq.* 18

MD. CODE. ANN., STATE PERS., § 1-101 *et seq.* . . . 18

MASS. ANN. LAWS ch. 31, § 1 *et seq.* 18

MINN. STAT. ANN. § 43A.01 *et seq.* 18

MISS. CODE ANN. § 25-9-101 *et seq.* 18

MO. ANN. STAT. § 36.010 *et seq.* 18

N.D. CENT. CODE § 54-44.3-01 *et seq.* 18

NEB. REV. STAT. § 81-1301 *et seq.* 18

NEV. REV. STAT. § 284.010 *et seq.* 18

N.J. STAT. ANN. § 11A:1-1 *et seq.* 18

N.M. STAT. ANN. § 10-9-1 *et seq.* 18

N.Y. CIV. SERV. LAW § 1 *et seq.* 18

OHIO REV. CODE ANN. § 124.01 *et seq.* 18

OKLA. STAT. ANN. tit. 74, § 840-1.1 *et seq.* 18

OR. REV. STAT. § 240.005 *et seq.* 18

PA. STAT. ANN. tit. 71, § 741.1 *et seq.* 18

S.C. CODE ANN. § 8-11-210 *et seq.* 18

S.D. CODIFIED LAWS ANN. § 3-6A-1 *et seq.* 18

TENN. CODE ANN. § 8-30-101 *et seq.* 18

UTAH CODE ANN. § 67-19-1 *et seq.* 18

VA. CODE ANN. § 2.1-110 *et seq.* 18

WASH. REV. CODE ANN. § 41.06.010 *et seq.* 18

W. VA. CODE § 29-6-1 *et seq.* 18

WIS. STAT. ANN. § 230.01 *et seq.* 18

OTHER AUTHORITY

George J. Gordon, PUBLIC ADMINISTRATION IN AMERICA 310 (3d ed. 1986) 13

Elizabeth Kolbert, *Forbes's Silver Bullet for the Nation's Malaise*, N.Y. TIMES, Jan. 1, 1996, at 1 15-16

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No. 95-191

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC.
AND JOHN A. GRATZIANNA,
Petitioners,
v.

CITY OF NORTHLAKE, MAYOR REID PAXSON,
AND POLICE CHIEF SEYMOUR SAPOZNIK,
Respondents.

BRIEF OF ILLINOIS STATE OFFICIALS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The question presented in this case is whether this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party*, 497 U.S. 62 (1990), should be extended to prohibit public officials from considering political affiliation and support in the selection of contractors who seek to do business with the government. The individuals upon whose behalf this brief is submitted are named defendants in two cases currently pending in the Seventh Circuit, *Tarpley v. Jeffers*, No. 93-4092 (S.D. Ill.), *appeal pending*, No. 95-2084 (7th Cir.), and *Vickery v. Jones*, No. 93 CV 4030 (S.D. Ill.), *appeal pending*, Nos. 96-1055 & 96-

1163 (7th Cir.), which seek to expand the Court's prior ruling in *Rutan* to cover temporary employees.[1] With the consent of the parties, the State Officials offer this brief as amicus curiae in accordance with Supreme Court Rule 37.3.

In 1990, this Court held that under the First Amendment, hiring, promotion, transfer and recall decisions involving public offices for which party affiliation is not an "appropriate requirement" may not be based on political affiliation and support. *Rutan*, 497 U.S. at 65. In response to this Court's decision in *Rutan*, former Governor James R. Thompson and Governor Jim Edgar (who took office January 14, 1991) issued a series of executive and administrative orders in an attempt to ensure that the multitude of personnel decisions made daily by state agencies, boards and commissions under the jurisdiction of the Governor were not based on political affiliation and support. At a cost of several hundreds of thousands of dollars, Governor Edgar also implemented the recommendations of the national accounting firm of Ernst & Young to enhance and document the objective elements of the State's personnel system, including the use of a standardized interview, evaluation and selection process to identify and rank qualified candidates without regard to political considerations.

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[1] The defendants in the *Tarpley* action include the Governor of Illinois, Jim Edgar, a member of the Governor's staff, Janis Cellini, and five officials in the Illinois Department of Mental Health and Developmental Disabilities -- Shawn Jeffers, Alan Pigg, Alice Kerns, Natalie Bales, and Don Schroyer. The defendants in the *Vickery* action include a member of the Governor's staff, Janell Jones Hilger, the Secretary of the Illinois Department of Transportation, Kirk Brown, and the Department's Bureau Chief of Personnel, William Pearman. This brief is submitted on behalf of all of these individuals, who are referred to collectively hereafter as "the State Officials."

Notwithstanding these measures, since the Court issued its *Rutan* ruling, more than sixty officers and employees of the State have been sued in at least eighteen cases, filed under 42 U.S.C. § 1983, alleging that particular employment decisions resulted in a violation of First Amendment rights. Typically, these cases have involved allegations by existing employees that, notwithstanding the results of the job-related interview and evaluation process, they were more qualified for a promotion than the candidate who was selected but were denied the position on the basis of "politics." The manner in which disappointed applicants and employees have sought to extend the ban on political considerations highlights the practical problems public officials face in interpreting and administering *Elrod*, *Branti*, and *Rutan*.

In both the *Tarpley* and *Vickery* cases, for example, the plaintiffs seek to extend *Rutan* to prohibit state agencies from taking political considerations into account when selecting temporary employees, even though it is undisputed that (1) temporary employees may not fill a particular temporary position for more than six months during any twelve month period, and (2) temporary employees are not eligible to receive any of the benefits associated with permanent employment other than a wage. In both cases, the plaintiffs also have alleged that they were denied particular jobs because of their failure to affiliate with or support the Republican Party. However, in *Vickery*, *supra*, the plaintiff admitted in his deposition that he was himself a long-time member and supporter of the Republican Party. The district court nonetheless held that plaintiff stated a First Amendment claim because "he lost the support of the Republican Party and, allegedly, the possibility of renewal of his [temporary]

contract, when his political sponsor no longer had political clout." *Vickery v. Jones*, 856 F. Supp. 1313, 1329 (S.D. Ill. 1994). Thus, at least one district court has extended *Rutan* to protect employees who share the same political affiliation and beliefs as the party in power.

Like the plaintiffs in *Tarpley* and *Vickery*, Petitioners here seek to extend the ban on political considerations to governmental decisions that are distinguishable from the practices at issue in *Elrod*, *Branti*, and *Rutan*. Petitioners claim that the Mayor of the City of Northlake removed their company from a list of qualified towing companies after Petitioners actively supported the Mayor's electoral opponent. The district court and Seventh Circuit held that the rule underlying this Court's decisions in *Elrod*, *Branti*, and *Rutan* does not extend to the award of public contracts, and dismissed Petitioners' complaint for failure to state a claim.

The State Officials have an interest in this case for two principal reasons. *First*, as noted above, the Edgar Administration has invested substantial time, money and effort in implementing a personnel system which complies with the Court's decision in *Rutan*. Nonetheless, state employees have been required to defend numerous lawsuits challenging particular personnel decisions which attempt to expand the reach of that decision and exploit the ambiguities and uncertainties in the applicable legal rules.

Second, each year agencies under the jurisdiction of the Governor enter into thousands of contracts for products and services, ranging from multi-million dollar contracts with large corporations for highway repair to inexpensive contracts for professional services with smaller firms. The vast majority of Illinois contracts are awarded either to the lowest bidder or pursuant to an apolitical competitive selection

procedure under the Illinois Purchasing Act. *See* 30 ILCS 505/1 *et seq*. Most of these contracts are awarded to the "lowest responsible bidder." Others, such as the competitive selection of engineer design consultants for road construction, involve a qualitative assessment of the skills necessary to perform the contracts. However, a number of contracts, *e.g.*, for repairs, maintenance or the purchase of commodities or equipment of less than $25,000, are not subject to the competitive selection requirements of the Purchasing Act. It is safe to assume that a significant number of the businesses which receive public contracts have contributed money or support to the campaigns of elected officials or to one (if not both) of the political parties. If the *Elrod*, *Branti*, and *Rutan* decisions are extended to cover public contracts, public officials may face the risk of a Section 1983 claim whenever a public contract is awarded (other than by low bid) to a firm that has provided political or financial support in the past. In addition to inspiring a new wave of litigation, the extension sought by Petitioners here will lead to the absurd result that public officials may best shield themselves from the threat of litigation by awarding contracts to supporters of their political opponents.

To resolve the question presented in this case, this Court should review the soundness of the constitutional rule which underlies *Elrod*, *Branti*, and *Rutan*, as well as how that rule has worked in practice. For the reasons set forth below, the judgment of the Seventh Circuit should be affirmed because *Rutan* should be overruled. Overruling this Court's 1990 ruling in *Rutan* provides an independent basis for affirming the Seventh Circuit's judgment, even though the Respondents did not raise this argument below. *See Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961) (citing amicus curiae

brief in reversing prior decision that the exclusionary rule did not apply to the states). Alternatively, the State Officials' experience since the *Rutan* decision militates strongly against extending that decision to provide for a claim based on the award of public contracts, like Petitioners' claim in this case.

STATEMENT OF THE CASE

The State Officials adopt Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

Elected officials have considered political loyalty and party affiliation in government employment since the administration of George Washington in 1789. Over two hundred years later in 1990, this Court held in *Rutan* that these practices had a significant "chilling effect" on First Amendment freedoms, which outweighed the states' interests in encouraging efficient and effective governmental operations and participation in the political process.

Now, this case raises the question of whether the First Amendment prohibits the use of political considerations in the award of public contracts. The Seventh Circuit declined to extend the reach of *Elrod*, *Branti*, and *Rutan* to include the award of public contracts, on the ground that this Court never has extended the ban on political considerations beyond government employees. While that analysis was correct, the Seventh Circuit's judgment should be affirmed on the independent ground that *Rutan* should be overruled. The *Rutan* holding is fundamentally flawed because it contradicts history and tradition from the earliest days of the Republic; it is analytically unsound; and, as demonstrated by experience since 1990, it has proved unworkable. These substantial flaws provide ample justification for departing from the

doctrine of stare decisis; therefore, we advocate the position set forth in the dissenting opinion of Justice Scalia in *Rutan*: the rules in *Elrod* and *Branti* should not be extended "beyond their facts, viz., actual discharge of employees for their political affiliation." 497 U.S. at 114.

Alternatively, even if this Court declines to overrule the *Rutan* decision, it should nonetheless affirm the judgment below because the presumption that First Amendment freedoms will be "chilled" if political factors are considered does not apply, or at least is substantially weakened, in the award of public contracts.

ARGUMENT

I.

THIS COURT'S DECISION IN *RUTAN* SHOULD BE OVERRULED BECAUSE IT IS UNSOUND IN PRINCIPLE, UNWORKABLE IN PRACTICE, AND HAS NOT ENGENDERED THE TYPE OF RELIANCE WHICH JUSTIFIES ADHERENCE TO THE DOCTRINE OF STARE DECISIS.

Effective government requires that elected officials be permitted to employ accountable, trusted employees not only to help make policy but to implement it. Decisions as to when to consider political affiliation or belief should not be continually subjected to second guessing based on ill-defined principles that are erratically interpreted.

Federal courts, which have no role in or responsibility for the effective performance of the executive branches of government, are ill-equipped to determine when political affiliation or belief is an appropriate job criterion. Individual judges have different views on that subject, as is evidenced by the plethora of decisions reaching diametrically opposite

conclusions. Government officials make hiring and contracting decisions on a daily basis which may lead to lawsuits seeking damage awards against them personally or against the government at taxpayer expense.

Consideration of political affiliation or support in governmental hiring and contracting decisions has existed in this country for over 200 years, from Presidents Washington and Jefferson to the present. During that time, judgments as to when political affiliation or belief should be considered in hiring have been made in the political arena by elected officials. The excesses of Tammany Hall and the like long ago were eliminated without judicial intervention; at least forty-three states, including Illinois, have some form of civil service code or merit system affording protection to the vast majority of state governmental employees. Illinois, like other states, also has a purchasing act which requires that the large majority of contracts must be awarded either to the lowest bidder or pursuant to a competitive selection procedure.

Notwithstanding this history and tradition, a sharply divided Court held for the first time in 1976 that the First Amendment limits the ability of elected officials to consider political beliefs in the employment process. *Elrod*, 427 U.S. at 375 (Stewart J., concurring). The decision in *Elrod* marked a significant departure from the understanding and practice of the Founding Fathers who enacted the First Amendment. As a result, each time the Court has considered, and expanded, the ban on politics in public employment, members of this Court have vigorously opposed the Court's intrusion into the field. *E.g.*, *Elrod*, 427 U.S. at 375 (Burger, C.J., dissenting); *id.* at 376 (Powell, J., dissenting); *Branti*, 445 U.S. at 521 (Powell, J., dissenting). In *Rutan*, the four dissenting members of this Court argued

that *Elrod* and *Branti* should be overruled (497 U.S. at 110-11; Scalia, J., dissenting):

> "Even in the field of constitutional adjudication, where the pull of *stare decisis* is at its weakest, *see Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (opinion of Harlan, J.), one is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice, then all reluctance ought to disappear. In my view that is the situation here."

In the alternative, the dissenters in *Rutan* argued that even if *Elrod* and *Branti* were correctly decided, those decisions "should not be extended beyond their facts, viz., actual discharge of employees for their political affiliation." *Id.* at 114 (Scalia, J., dissenting). Addressing the burdens allegedly imposed on applicants and employees who fail to obtain a desired job, transfer or promotion, the dissent reasoned that "[t]he loss of one's current livelihood is an appreciably greater constraint than such other disappointments as the failure to obtain a promotion . . . . Even if the 'coercive' effect of the former has been held always to outweigh the benefits of party-based employment decisions, the 'coercive' effect of the latter should not be." *Id.*

The dissenters in *Rutan* also rejected the Seventh Circuit's proposed standard, which extended *Elrod* to provide for a cause of action "if the employee can demonstrate that he was subjected to the 'substantial equivalent of dismissal.'" *Id.* The dissenters opted for a more limited and certain standard (*id.*): "If *Elrod* and *Branti* are not to be

reconsidered in light of their demonstrably unsatisfactory consequences, I would go no further than to allow a cause of action when the employee has lost his position, that is, his formal title and salary."

There is no indication that the dissenting Justices in *Rutan* have retreated from their view that *Elrod* and *Branti* should be overruled, or, at the very least, limited to their facts. In addition, decisions since *Rutan* suggest that the Court may properly return to a methodology of constitutional interpretation which looks to history and the understanding of the Framers to apprehend the meaning of the Bill of Rights. *See, e.g., McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511, 1525 (1995) (Thomas, J., concurring); *id.* at 1531 (Scalia, J., dissenting). Given that there is nothing in the language of the First Amendment that bans political considerations in public employment, and given that *the Framers* openly considered politics in making their own appointments, it appears that if the issue were presented for the first time, this Court likely would hold that the Constitution does not prevent elected officials from selecting employees or awarding contracts on the basis of political affiliation and belief.

The question therefore arises whether, under the circumstances, "the pull of stare decisis" is sufficient to reaffirm a holding which is unsound and unworkable, or whether the Court should abandon the constitutional rule underlying *Rutan*. In *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), Justice Frankfurter admonished that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically

sounder, and verified by experience." More recently, this Court has identified three principal factors which inform the Court's determination whether to reaffirm or overrule a prior decision: (1) whether the decision being challenged is sound in principle; (2) whether the prior decision has proved workable in practice; and (3) whether the prior decision is likely to have engendered substantial reliance. *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 783 (1992). *See also Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2114-17 (1995); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-69 (1992). As we demonstrate below, each of these factors compels a departure from the doctrine of stare decisis in this case.

A. *Rutan* Was Incorrectly Decided.

The Court's decision in *Rutan* is unsound for three independent reasons. *First*, the constitutional rule underlying *Rutan* contradicts the practice of the Founding Fathers and over 200 years of history and tradition. *Second*, the Court's decision exaggerated the burdens which political considerations impose on the First Amendment rights of affected applicants and employees, and it underestimated the contributions such considerations make to the competing interests at stake. *Third*, the Court's ruling was premised on judgments about our political system which should be left to the people's elected representatives.

1. The constitutional rule which underlies *Rutan* ignored 200 years of history and tradition.

This Court traditionally has looked to history and the intention of the Framers in construing the broad principles

which animate our Constitution. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring); *South Carolina v. United States*, 199 U.S. 437, 448 (1905). As Justice Thomas observed in his concurrence in *McIntyre*, 115 S. Ct. at 1525 (citation omitted), "'[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.'" Justice Thomas continued (*id.*, citations omitted):

> "We should seek the original understanding when we interpret the Speech and Press Clauses, just as we do when we read the Religion Clauses of the First Amendment. When the Framers did not discuss the precise question at issue, we have turned to 'what history reveals was the contemporaneous understanding of [the Establishment Clause's] guarantees.' '[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.'"

The First Amendment is silent as to whether political factors may be considered in selecting public employees. This Court did not address the constitutionality of such considerations in any form until 1976. That is not surprising, however, because political patronage is by all accounts "as old as the Republic." *Elrod*, 427 U.S. at 376 (Powell, J., dissenting). *See also id.* at 353 (Brennan, J., plurality) ("Patronage practice is not new to American politics. It has existed at the federal level at least since the Presidency of

Thomas Jefferson"); *Rutan*, 497 U.S. at 81 (tradition of patronage "dates back to the beginning of the Republic").

We know, for example, that President Washington "tended to confine appointments even of customs officials and postmasters to Federalists, as opposed to anti-Federalists." *Elrod*, 427 U.S. at 378 (Powell, J., dissenting). We also know that Thomas Jefferson, the first President to succeed a leader of the opposing party, "made significant patronage use of the appointment and removal powers." *Id.* And, while the *Elrod* plurality credited Andrew Jackson with the "popularization and legitimation" of patronage, *id.* at 353, patronage also was "practiced widely in the States, especially in New York and Pennsylvania." *Id.* at 378 (Powell, J., dissenting). *See also* George J. Gordon, PUBLIC ADMINISTRATION IN AMERICA 310 (3d ed. 1986) (patronage developed during the 1820's in the state and local governments of many newly admitted states, fostering loyal party organizations).

The limitation on considering political affiliation in public employment which the Court imposed in 1976, and dramatically expanded in 1990 in *Rutan*, improperly ignored two hundred years of contrary tradition. In light of the understanding and practice of the Founding Fathers, the foundation for the Court's decision in *Rutan* is unsound.

2. *Rutan* incorrectly balanced the competing interests at stake.

At the outset, it is unclear what standard the Court will apply to balance the competing interests at stake in this case. In *Elrod*, the plurality asserted that because considering political factors "severely restrict[s]" political belief and association (427 U.S. at 347), it must survive "exacting

scrutiny," *i.e.*, the government bears the burden of advancing an interest of "vital importance." *Id.* at 362. In *Rutan*, the majority adopted the *Elrod* framework without questioning whether strict scrutiny applied. *See* 497 U.S. at 74. The dissent, however, found that the "strict-scrutiny standard finds no support in our cases," *id.* at 98; instead, "'[a] governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government.'" *Id.* (quoting *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980)). More recently, members of this Court have recognized that the government is entitled to greater deference where, as here, it is acting as employer, rather than as sovereign. *See United States v. Nat'l Treasury Employees Union*, 115 S. Ct. 1003, 1017 n.21 (1995); *Waters v. Churchill*, 114 S. Ct. 1878, 1886 (1994) (O'Connor, J., plurality). Consequently, it is not clear that this Court will apply strict scrutiny to the allegations in Petitioners' complaint.

Even if the Court applies strict scrutiny, however, *Rutan* incorrectly balanced the competing interests at stake by exaggerating the presumed burdens on First Amendment rights and underestimating the strength of the State's interests in encouraging participation in the political process and promoting effective and accountable government.

Rutan came before this Court upon dismissal of the plaintiffs' complaint for failure to state a claim. In the absence of any factual record, the majority opinion presumed that the failure to obtain a desired promotion or transfer, based on political considerations, imposed "significant penalties" on the exercise of First Amendment rights. 497 U.S. at 74. However, the plaintiffs were not singled out or punished by the practices alleged (and assumed to be true) in

the *Rutan* complaint; instead, they simply failed to receive some favorable treatment from their government employer. *Id.* at 114 (Scalia, J., dissenting). In light of this difference, the dissent found that considering political affiliation in hiring, promoting and transferring public employees did not constitute "a significant impairment of free speech or free association." *Id.* at 110.

The majority in *Rutan* also failed to recognize that the consideration of politics in the selection process is just as likely -- if not more likely -- to inspire, rather than chill, the exercise of First Amendment freedoms. Individuals who cannot obtain a desired job, transfer or promotion may be impelled to join the debate, rather than shrink from political life, to advance the electoral fortunes of the party out of power.

Against these limited burdens are the State's compelling interests in promoting (1) participation in the political process, (2) the stability of the two party system, and (3) the efficiency and effectiveness of governmental operations. These interests are discussed at great length in the dissent in *Rutan*, and will not be recounted here. *See Rutan*, 497 U.S. at 103-08 (Scalia, J., dissenting). *See also Branti*, 445 U.S. at 528-33 (Powell, J., dissenting); *Elrod*, 427 U.S. at 380 (Powell, J., dissenting). We note only that subsequent experience has confirmed the dissent's observation that to the extent media and money-intensive techniques have replaced traditional methods of campaigning, "the political system is not clearly better off." *Rutan*, 497 U.S. at 105 (Scalia, J., dissenting). *See, e.g.*, Elizabeth Kolbert, *Forbes's Silver Bullet for the Nation's Malaise*, N.Y. TIMES, Jan. 1, 1996, at 1 (candidate for Republican presidential nomination, Steve Forbes, is rewriting rules of presidential

campaign with private spending on television advertising but no party organization); Steven A. Holmes, *The 1992 Elections: Disappointment -- News Analysis*, N.Y. TIMES, Nov. 5, 1992, at A1 (billionaire independent candidate H. Ross Perot received more than eighteen percent of the popular vote in the 1992 presidential general election, using his own monetary resources).

The Court's decision in *Rutan* was based on the premise that considering political loyalty and belief in the employment process makes a limited contribution to the democratic process while severely encroaching First Amendment freedoms. In fact, the opposite is true; the limited encroachments on First Amendment freedoms are outweighed by important contributions to the political process and effective government.[2]

3. Whether to consider political factors in public employment is a question for the people to decide through their elected representatives.

To overrule its prior decision in *Rutan*, this Court does not have to find that placing political supporters or contractors into government jobs always promotes effective government or that it invariably benefits the political system. Rather, the Court need only conclude that the determination

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[2] In view of the important interests at stake, this case is distinguishable from *Heiser v. Umbehr*, No. 95-1654 (U.S.) (oral argument held November 28, 1995), which involves alleged retaliation for speaking out on matters of public concern. Whereas history and the state's compelling interests in the stability of our democratic system and effective governmental operations justify the consideration of political factors in employment, these interests are neither relevant to nor served by punishment of the speech that is at issue in *Heiser*.

whether politics is relevant to the selection of government employees or contractors is a judgment best left to the representative branches of the federal government, and states, counties, cities and towns across the country. As the dissenters argued in *Rutan* (497 U.S. at 110, emphasis in original):

> "To oppose our *Elrod-Branti* jurisprudence, one need not believe that the patronage system is *necessarily* desirable; nor even that it is always and everywhere *arguably* desirable; but merely that it is a political arrangement that may sometimes be a reasonable choice, and should therefore be left to the judgment of the people's elected representatives."[3]

These political judgments will vary, of course, from time to time and place to place. However, a survey of sister states shows that, in addition to Illinois, *see* 20 ILCS 415/1 *et seq.*, at least forty-two states have adopted some form of civil service system or merit selection principles for the

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[3] *See also Branti*, 445 U.S. at 525-26 (Powell, J., dissenting) ("A constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key governmental personnel. Federal judges will now be the final arbiters as to who federal, state and local governments may employ. In my view, the Court is not justified in removing decisions so essential to responsible and efficient governance from the discretion of legislative and executive officials"); *Elrod*, 427 U.S. at 375-76 (Burger, C.J., dissenting) ("the issue is not so much whether the patronage system is 'good' or 'bad,' as the plurality characterizes the problem, but whether the choice of its use in the management of the very government of each State was not, in the words of the Tenth Amendment, 'reserved to the States . . . or to the people.'")

effective administration of government and the protection of public employees.[4]

Judgments about the role which politics should play in public employment are best left to the political process for two principal reasons. *First*, establishing the ideal model for effective and responsible government is a question of political science, not constitutional law. *See* Glen S. Howard, Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 323 n.115 (1974) ("It is very difficult to determine objectively which form of governmental organization is the most effective and efficient, in part because it is necessary to make basic

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[4] *See, e.g.*, ALA. CODE § 36-26-1 *et seq.*; ALASKA STAT. § 39.25.010 *et seq.*; ARIZ. REV. STAT. ANN. § 41-761 *et seq.*; CAL. GOV. CODE § 18500 *et seq.*; COLO. REV. STAT. § 24-50-101 *et seq.*; CONN. GEN. STAT. § 5-193 *et seq.*; DEL. CODE ANN. tit. 29, § 5901 *et seq.*; D.C. CODE. ANN. § 1-601.1 *et seq.*; FLA. STAT. ANN. § 110.201 *et seq.*; GA. CODE ANN. § 45-20-1 *et seq.*; HAW. REV. STAT. § 76-1 *et seq.*; IDAHO CODE § 67-5301 *et seq.*; IND. CODE ANN. § 4-15-2-1 *et seq.*; IOWA CODE ANN. § 19A.1 *et seq.*; KAN. STAT. ANN. § 75-2925 *et seq.*; KY. REV. STAT. ANN. § 18A.005 *et seq.*; LA. REV. STAT. ANN. § 721 *et seq.*; ME. REV. STAT. ANN. tit. 5, § 7031 *et seq.*; MD. CODE. ANN., STATE PERS., § 1-101 *et seq.*; MASS. ANN. LAWS ch. 31, § 1 *et seq.*; MINN. STAT. ANN. § 43A.01 *et seq.*; MISS. CODE ANN. § 25-9-101 *et seq.*; MO. ANN. STAT. § 36.010 *et seq.*; NEB. REV. STAT. § 81-1301 *et seq.*; NEV. REV. STAT. ANN. § 284.010 *et seq.*; N.J. STAT. ANN. § 11A:1-1 *et seq.*; N.M. STAT. ANN. § 10-9-1 *et seq.*; N.Y. CIV. SERV. LAW § 1 *et seq.*; N.D. CENT. CODE. § 54-44.3-01 *et seq.*; OHIO REV. CODE ANN. § 124.01 *et seq.*; OKLA. STAT. ANN. tit. 74, § 840-1.1 *et seq.*; OR. REV. STAT. § 240.005 *et seq.*; PA. STAT. ANN. tit. 71, § 741.1 *et seq.*; S.C. CODE ANN. § 8-11-210 *et seq.*; S.D. CODIFIED LAWS ANN. § 3-6A-1 *et seq.*; TENN. CODE ANN. § 8-30-101 *et seq.*; UTAH CODE ANN. § 67-19-1 *et seq.*; VA. CODE ANN. § 2.1-110 *et seq.*; WASH. REV. CODE ANN. § 41.06.010 *et seq.*; W. VA. CODE § 29-6-1 *et seq.*; WIS. STAT. ANN. § 230.01 *et seq.*

assumptions as to what the government should be efficient in doing and to what ends it should be effective."). *Second*, as demonstrated more fully below, federal courts have proved unable to coherently and consistently identify when party affiliation and support are legitimate considerations in the selection of public employees.

B. The Constitutional Rule Which Underlies *Rutan* Has Proved Unworkable.

When this Court reexamines a prior holding, its "judgment is informed by a series of prudential and pragmatic considerations," including whether the rule has proved unworkable. *Planned Parenthood*, 505 U.S. at 854. *See also Allied-Signal*, 504 U.S. at 783 (one relevant consideration is whether the prior decision is "unworkable in practice"), *quoting Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985). In this case, the Court's rulings in *Elrod*, *Branti*, and *Rutan* are unworkable in at least four dimensions.

First, four members of the Court already have identified a principal problem with administering and complying with the ban on political considerations in public employment: the determination of who may be hired or promoted on the basis of political affiliation and belief. In recognition of the governmental interests which support the consideration of political factors, including but not limited to promoting accountability to the electorate, this Court has recognized that many employment decisions properly *are* based on political considerations. *See, e.g., Elrod*, 427 U.S. at 367-68. The problem, however, is that the line between permissible and impermissible political considerations has been extremely difficult to discern, causing confusion in the lower courts and confounding public officials who must

attempt to identify those positions which may be filled with their political supporters.

In *Branti*, 445 U.S. at 518, the Court held that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." As the dissenters noted in *Rutan*, "[w]hat that means is anybody's guess." *Rutan*, 497 U.S. at 111-12 (Scalia, J., dissenting) (citing sixteen lower court cases applying the *Branti* standard with inconsistent and irreconcilable results). Since *Rutan*, the lower courts have continued to struggle with the standard for identifying those positions which may be filled on the basis of party affiliation and belief. Not surprisingly, the result is a hodge-podge of inconsistent rulings, with the results governed most by the number of the federal circuit in which the claim was brought.[5] The uncertainty and confusion is

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[5] For example, some courts have held that the position of deputy sheriff is not one for which political affiliation is an appropriate consideration. *See, e.g., Brady v. Fort Bend County*, 58 F.3d 173, 174 (5th Cir. 1995) (recognizing conflicting decisions); *Vojvodich v. Lopez*, 48 F.3d 879, 886 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 169 (1995); *Stough v. Gallagher*, 967 F.2d 1523, 1529 (11th Cir. 1992), *rehearing denied*, 978 F.2d 718 (11th Cir. 1992). Other courts have reached the opposite conclusion. *See, e.g., Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991) ("the indefiniteness of the applicable *Branti* standard has resulted in judicial confusion and inconsistency"), *cert. denied, Thulen v. Bausman*, 503 U.S. 906 (1992). The courts have had a similar problem with the position of highway superintendent. *Compare Vezzetti v. Pellegrini*, 22 F.3d 483, 486 (2nd Cir. 1994) (political affiliation properly considered); *Selch v. Letts*, 5 F.3d 1040, 1047 (7th Cir. 1993) (same), *cert. denied*, 114 S. Ct. 1189 (1994) *with Akers v. Caperton*, 998 F.2d 220, 225 (4th Cir. 1993) (continued...)

inevitable because the determination of whether and when political affiliation and support is an appropriate requirement for the effective performance of the public office involved is a political judgment that "exceed[s] judicial competence to answer." *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

Second, there are significant problems in divining the meaning of political "affiliation and support." Does the term include personal differences among members of the same party, or subtle intra-party differences in policy beliefs? In the *Vickery* case, discussed *supra* at 3-4, the plaintiff contends that although he was a member and supporter of the incumbent Republican party, he did not receive a temporary position because he was not a "strong enough" supporter. The district court upheld the plaintiff's First Amendment claim without any evidence that the employment decision interfered with or even affected the plaintiff's political beliefs or affiliation, reasoning that "it does not matter that the plaintiff admits that he is a Republican." *Vickery*, 856 F. Supp. at 1329. As a result, it appears that a plaintiff can state a valid federal constitutional claim based on his or her personal disagreement with some party members. Giving plaintiffs this kind of claim does not address the supposed evil of political patronage; *i.e.*, it is not responsive to any real fear that plaintiffs will be "coerced" into sacrificing their true political beliefs in order to obtain a desired contract or advance in their careers.

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[5] (...continued)
(political affiliation *not* properly considered). The differences among the circuits on certain positions, of course, does not reflect the true depth of the uncertainty problem. Government officials must struggle daily to apply the standard to positions in the absence of any judicial guidance.

There are other aspects to this problem. It is not clear whether the political "affiliation and support" at issue must be that of the plaintiff. In another pending case filed against officials of the State of Illinois, *Peek v. Jason*, No. 94-3027 (C.D. Ill.), the plaintiff seeks to extend the ban on political considerations to include personal or familial ties. In *Peek*, an employee contends that she was denied a promotion in violation of the First Amendment because the candidate who was selected is the daughter of a Republican Party official. This case raises the question whether a public employer may run afoul of *Rutan*, or at least be forced to go to trial, *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), whenever the public agency selects an employee who happens to have a personal or familial relationship with a political figure. If the political activities and beliefs of a relative, friend or supporter are enough to justify a constitutional claim, the universe of claims and claimants will grow exponentially even in the absence of *any* chilling effect on First Amendment freedoms.

Similarly, it is often difficult to determine when the prohibited "support" is "political" rather than personal. A personnel recommendation may come from a legislator or an official of a political party, but the recommendation may nonetheless be based on friendship or a favorable assessment of the candidate's character, skills and experience.

To illustrate the point, let us consider application of the *Rutan* holding to a case where a civil servant is about to hire a correctional officer. The civil servant has narrowed the field of applicants to the two most qualified candidates for the job. Candidate No. 1, who is slightly more qualified for the position, has received a letter of recommendation from his local state representative attesting to the candidate's

diligence, skill and experience. Candidate No. 2 has no recommendations from any elected officials.

In this hypothetical case, the career civil servant has a choice: he can hire the better qualified candidate, and risk a lawsuit against his personal assets, or he can hire the slightly less qualified candidate and avoid that risk. We suggest that many career civil servants would (and do) choose the latter option. The net practical effect is that *Rutan* has not encouraged the exercise of First Amendment rights in the political process; it has effectively punished at least some individuals who exercise those rights.

Third, there is no meaningful method of determining which public economic relationships are embraced by the ban on considering political factors. *Rutan* involved the hiring, promotion, transfer and recall of career employees. In the *Tarpley* and *Vickery* cases, the district courts extended the limit on "political considerations" to include temporary employees, who do not receive any employment benefits other than a wage and who may hold a position for as short as one day but in no event longer than six months in any twelve month period. 20 ILCS 415/8b.9. *See Tarpley v. Jeffers*, No. 93 CV 4092 JPG, Mem. & Ord. at 6-7 (S.D. Ill. Apr. 6, 1995); *Vickery*, 856 F. Supp. at 1325 (prohibiting the selection of temporary employees on the basis of political affiliation and support "regardless of the length of time the individual will serve"). The plaintiffs in *Tarpley* and *Vickery* seek not only to extend the *Rutan* holding to cover temporary jobs, they also request that, in making seasonal appointments, state officials be prohibited from considering the *experience or actual job performance* of employees who had been appointed to temporary positions in the past on the basis of

political affiliation. *See, e.g., Vickery v. Jones*, No. 93 CV 4030, Mem. & Ord., at 2 (S.D. Ill. Sept. 15, 1994).

Petitioners in this case assert that they will be chilled in the exercise of their First Amendment rights if they are not on the list of qualified firms which may be hired by the city to provide towing services. Petitioners did not have a firm contract to provide specific services at a set price; instead, they allege only that they were on a rotation list of firms that are called if and when the need arises. (Appendix to Petition for a Writ of Certiorari 22a-24a.) The differences between the nature of Petitioners' economic interest and that of the plaintiffs in *Elrod* is significant.

In general, the nature of economic relationships between government and its constituents varies widely: temporary employees, emergency workers, summer interns, and volunteers all provide services to public entities. At some point, however, the nature and importance of the economic relationship with the government must become so slight that there is no meaningful chance of coercion. Yet, at least one court of appeals has held that even the loss of a *volunteer* position may be actionable under the First Amendment. *See Hyland v. Wonder*, 972 F.2d 1129, 1135-36 (9th Cir. 1992). This aspect of *Rutan* also is unworkable.

Fourth, there is no principled way to determine when an adverse act has sufficient potential to chill First Amendment activity. *Rutan* was premised upon the Court's determination that the employment practices alleged in that case significantly burdened First Amendment freedoms. Yet, the majority appeared to suggest that even "trivial" matters may give rise to a constitutional claim. *Rutan*, 497 U.S. at 76 n.8. This raises the question whether other incidents of employment, like shift assignment, official location, nature

of a position's duties, or even radio privileges, can make out a First Amendment claim. Would a public employee ever really change his political affiliation in order to be able to play a radio on the job?

At bottom, the constitutional rule underlying the Court's decision in *Rutan* has raised more questions than it answered. The inherent ambiguities in *Rutan* and related decisions impose expensive burdens on state and local officials charged with administering the personnel systems affecting millions of employees. The uncertainties breed inefficiency and injustice when they hamper effective governmental operations, hold public officials accountable if they mistakenly interpret these rules, or create false expectations in public employees. The confusion results in a multitude of federal lawsuits over the fine points of the Court's rules which do not bear on the actual First Amendment interests at stake.

The rule implicated in *Rutan* does not simply need additional "fine-tuning" by the courts. "This uncertainty and confusion are not the result of the fact that *Elrod*, and then *Branti*, chose the wrong 'line' . . . there is no right line -- or at least no right line that can be nationally applied and that is known by judges." *Rutan*, 497 U.S. at 113 (Scalia, J., dissenting). In short, the definitional problems with *Rutan* support a retreat from the Court's attempt to regulate politics in public life through a questionable interpretation of the First Amendment. Overruling *Rutan* will leave public officials and employees with a narrow and clear rule, which limits constitutional claims to those cases involving "actual discharge of employees for their political affiliation." *Id.* at 114 (Scalia, J., dissenting).

C. The Court's Interpretation of the First Amendment Has Not Engendered Reliance So As To Justify Adherence To The Doctrine Of Stare Decisis.

Given the unsound and unworkable nature of *Rutan*, stare decisis should not suffice to uphold that decision unless it has engendered "a kind of reliance that would lend a special hardship to the consequences of overruling [it] and add inequity to the cost of repudiation." *Planned Parenthood*, 505 U.S. at 854. This consideration does not apply here, because *Rutan*, like *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), is a recent decision which has not become part of the constitutional "fabric." *Adarand*, 115 S. Ct. at 2116. Indeed, *Rutan* has been cited only twice by this Court, and never for the rule it announced. *See Payne v. Tennessee*, 501 U.S. 808, 852 n.2 (1991) (Marshall, J., dissenting); *United States v. Kokinda*, 497 U.S. 720, 747 n.4 (1990) (Brennan, J., dissenting).

Overruling *Rutan* will not cause "special hardship" or "inequity" for an additional reason: elected officials in states, cities and counties across the country will remain free to limit (or even prohibit) the consideration of politics in the selection of public employees. In Illinois, for example, more than 85% of the 73,710 employees under the jurisdiction of the Governor hold civil service positions which are governed by the merit and fitness provisions of the Illinois Personnel Code and the accompanying rules promulgated by the Civil Service Commission. *See* 20 ILCS 415/1 *et seq.*; ILL. ADMIN. CODE tit. 80 Ch. I, § 302.10 *et seq*. (The majority of other positions, such as engineers at the Illinois Department of Transportation, are included in a technical pay plan and enjoy job protection roughly equivalent to the

employees covered by the Personnel Code.) The civil service system in Illinois not only limits the ability of state agencies to fire employees; it also provides that the State may not discriminate against applicants for any "non-merit factor." ILL. ADMIN. CODE tit. 80, Ch. I, § 302.790(a).

In contrast to *Planned Parenthood*, aspiring and existing public employees have not relied to any substantial degree on the rule of *Rutan*. To the extent that employees need protection from excessive politicization or arbitrary personnel practices, their recourse is (and for many years has been) the political process, *i.e.*, the laws, rules and regulations which their elected representatives have enacted to best manage government personnel and to promote effective and efficient governmental operations.

II.

THE COURT SHOULD NOT EXTEND THE REACH OF *RUTAN* TO GOVERN THE AWARD OF PUBLIC CONTRACTS.

The Court should not extend the limit on political considerations to the award of public contracts for three reasons. *First*, even if the Court determines that the "pull" of stare decisis -- involving considerations unrelated to the wisdom or efficacy of *Rutan* itself -- is strong enough to counsel against outright rejection of that decision, the Court is not required to propagate unsound doctrine. In this case, Petitioners are asking the Court to do more than *adhere* to its prior holding. Petitioners ask the Court to *extend* the limits of the ban on considering political factors to a completely different economic relationship. No party contends that this Court has actually spoken before to the question presented by this case -- whether a business which

supported an elected official's political opponent states a First Amendment claim when the business fails to receive a public contract from the official it opposed. Nothing in the doctrine of stare decisis requires the Court to extend or strengthen a doctrine which is unsound. As the Court observed in another context, the Court should not "extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so." *Scott v. Illinois*, 440 U.S. 367, 372 (1979).

Second, the constitutional rule at issue cannot be meaningfully applied to entities comprised of multiple individuals. As we demonstrated above, it is difficult enough to figure out what the prohibition of "political affiliation and support" means in the case of individual applicants or employees. (*See supra* at 21-23.) Petitioners ask this Court to apply the same rule to legal entities or associations of more than one individual. Most entities organized for profit, however, do not have an easily identifiable political affiliation or belief. *See LaFalce*, 712 F.2d at 294. These entities run the gamut. At one end is a case like Petitioners': a small company owned by a single individual. Somewhere in the middle is a corporate entity with several owners and numerous employees; and, at the other end, is a large national corporation with dozens of top officers, hundreds if not thousands of owners, and thousands of employees. In such cases, it is difficult to discern a "prevailing" political affiliation. The Court should decline to extend the ban on political considerations to the award of public contracts because it is extremely difficult (if not impossible) to coherently determine the "political affiliation" of entities consisting of more than one individual.

Third, whatever the wisdom of shielding public employees from political considerations, the Court should decline to extend this rule to the award of public contracts because "there are enough differences in the strength of the competing interests in the two classes of cases not to attempt to do so." *LaFalce*, 712 F.2d at 295. In *Rutan*, the Court focused on the "coercive effect" that considering political factors would likely have on a typical applicant or employee. The Court's determination rested on three principal assumptions about a typical "employee": (1) that the government position was the employee's primary source of income; (2) that the employee would be unable to find equivalent work in the private sector; and (3) that the employee would actually be coerced into forfeiting his true political beliefs instead of becoming more politically involved. *See Rutan*, 497 U.S. at 72-74.

Even assuming, arguendo, that a per se rule is appropriate for employees, the same assumptions underlying the rule cannot be made about businesses which compete for public contracts. Bidders on public contracts come in all shapes and sizes; they are too heterogeneous to apply the same presumptions which supported a per se rule for employees. For example, contractors are far more likely to obtain income in the private sector. *LaFalce*, 712 F.2d at 294. They are more likely to have sufficient capital at their disposal so that the loss of a particular contract does not cause economic hardship. *Id.* They are more likely to be "political hermaphrodites," supporting both parties. *Id.* There is simply no valid reason to believe that corporate entities would be coerced into any particular political position. Given the variety of public contracts and the entities that compete for them, a per se rule like the rule

adopted in *Rutan* based on assumptions about the "typical" independent contractor is not justified or defensible.

CONCLUSION

For the foregoing reasons, the State Officials respectfully submit that the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

RESPECTFULLY SUBMITTED,

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